# DOCKET

# SUPREME COURT
OF THE UNITED STATES

No. 10-704
Title: Curt Messerschmidt, et al Petitioners
v.
Brenda Millender, as Executor of the Estate of Augusta Millender, Deceased, et al.
Docketed: November 30, 2010
Lower Ct: United States Court of Appeals for the Ninth Circuit
Case Nos.: (07-55518)
Decision Date: August 24, 2010
Questions Presented:

| ~~~Date~~~ | ~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~ |
|---|---|
| Nov 22 2010 | Petition for a writ of certiorari filed. (Response due December 30, 2010) |
| Dec 6 2010 | Waiver of right of respondents Augusta Millender, et al. to respond filed. |
| Jan 12 2011 | DISTRIBUTED for Conference of February 18, 2011. |
| Jan 28 2011 | Response Requested. (Due February 28, 2011) |
| Feb 9 2011 | Order extending time to file response to petition to and including April 14, 2011. |
| Apr 14 2011 | Brief of respondents Augusta Millender, et al. in opposition filed. |
| Apr 25 2011 | Reply of petitioners Curt Messerschmidt, et al. filed. (Distributed) |
| Apr 26 2011 | DISTRIBUTED for Conference of May 12, 2011. |
| May 12 2011 | Record Requested. |
| May 16 2011 | DISTRIBUTED for Conference of May 19, 2011. |
| May 16 2011 | Record received from the U.S. Court of Appeals for the 9th Circuit (One box). |
| May 17 2011 | Record received from US District Court Central District of California (2 boxes). |
| May 23 2011 | DISTRIBUTED for Conference of May 26, 2011. |
| May 31 2011 | DISTRIBUTED for Conference of June 2, 2011. |
| Jun 6 2011 | DISTRIBUTED for Conference of June 9, 2011. |
| Jun 13 2011 | DISTRIBUTED for Conference of June 16, 2011. |
| Jun 20 2011 | DISTRIBUTED for Conference of June 23, 2011. |
| Jun 27 2011 | Petition GRANTED. |
| Jul 14 2011 | The time to file the joint appendix and petitioners' brief on the merits is extended to and including August 26, 2011. |
| Aug 11 2011 | The time to file respondents' brief on the merits is extended to and including October 17, 2011. |
| Aug 26 2011 | Joint appendix filed. (Statement of costs filed) |
| Aug 26 2011 | Brief of petitioners Curt Messerschmidt, et al. filed. |

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|---|---|
| Sep 2 2011 | Brief amicus curiae of the United States filed. |
| Sep 2 2011 | Brief amici curiae of Texas, et al. filed. |
| Sep 12 2011 | SET FOR ARGUMENT ON Monday December 5, 2011. |
| Sep 19 2011 | CIRCULATED. |
| Oct 17 2011 | Brief of respondents Augusta Millender, et al. filed. (Distributed) |
| Oct 17 2011 | Motion of Brenda Millender and respondents for substitution of party in place of Augusta Millender, deceased. |
| Oct 19 2011 | Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed. |
| Oct 24 2011 | Brief amici curiae of National Rifle Association of America, Inc., et al. filed. (Distributed) |
| Oct 24 2011 | Brief amicus curiae of American Civil Liberties Union filed. (Distributed) |
| Oct 26 2011 | Motion DISTRIBUTED for Conference of November 10, 2011. |
| Nov 7 2011 | Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED. |
| Nov 14 2011 | Motion of Brenda Millender and respondents for substitution of party in place of Augusta Millender, deceased GRANTED. |
| Nov 16 2011 | Reply of petitioners Curt Messerschmidt, et al. filed. (Distributed) |
| Dec 5 2011 | Argued. For petitioners: Timothy T. Coates, Los Angeles, Cal.; and Sri Srinivasan, Principal Deputy Solicitor General, Department of Justice, Washington, D. C. (for United States, as amicus curiae.) For respondents: Paul R. Q. Wolfson, Washington, D. C. |
| Feb 22 2012 | Judgment REVERSED. Roberts, C. J., delivered the opinion of the Court, in which Scalia, Kennedy, Thomas, Breyer, and Alito, JJ., joined. Breyer, J., filed a concurring opinion. Kagan, J., filed an opinion concurring in part and dissenting in part. Sotomayor, J., filed a dissenting opinion, in which Ginsburg, J., joined. |
| Mar 26 2012 | JUDGMENT ISSUED. |

# PETITION FOR WRIT OF CERTIORARI

Supreme Court, U.S.
FILED

No. _____

# In The Supreme Court of the United States

CURT MESSERSCHMIDT and ROBERT J. LAWRENCE,

*Petitioners,*

vs.

AUGUSTA MILLENDER, BRENDA MILLENDER, and WILLIAM JOHNSON,

*Respondents.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

This Court has held that police officers who procure and execute warrants later determined invalid are entitled to qualified immunity, and evidence obtained should not be suppressed, so long as the warrant is not "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." *United States v. Leon*, 468 U.S. 897, 920, 923 (1984); *Malley v. Briggs*, 475 U.S. 335, 341, 344-45 (1986).

The Questions Presented are:

1. Under these standards, are officers entitled to qualified immunity where they obtained a facially valid warrant to search for firearms, firearm-related materials, and gang-related items in the residence of a gang member and felon who had threatened to kill his girlfriend and fired a sawed-off shotgun at her, and a district attorney approved the application, no factually on-point case law prohibited the search, and the alleged overbreadth in the warrant did not expand the scope of the search?

2. Should the *Malley/Leon* standards be reconsidered or clarified in light of lower courts' inability to apply them in accordance with their purpose of deterring police misconduct, resulting in imposition of liability on officers for good faith conduct and improper exclusion of evidence in criminal cases?

## PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The parties to the proceeding in the court whose judgment is sought to be reviewed are:

- Augusta Millender, Brenda Millender, and William Johnson, plaintiffs, appellees below, and respondents here.
- Robert J. Lawrence and Curt Messerschmidt, defendants, appellants below, and petitioners here.

The County of Los Angeles was a defendant in the underlying action and an appellant below, but is not a party to this petition.

No corporations are involved in this proceeding.

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The Ninth Circuit's *en banc* opinion, the subject of this petition, is reported at 620 F.3d 1016 (9th Cir. 2010). (Appendix ["App."]1-76.) The Ninth Circuit's initial opinion is published at 564 F.3d 1143. (App.79-105.) Its order granting rehearing *en banc*, filed October 2, 2009, is published at 583 F.3d 669. (App.77-78.) The district court's decision denying qualified immunity was not published in the official reports. (App.106-209.)

## JURISDICTION

The Ninth Circuit initially filed its opinion on May 6, 2009. (App.79.) Respondents timely petitioned for rehearing, and on October 2, 2009, the Ninth Circuit ordered the case reheard *en banc*. (App.77-78.) The *en banc* panel issued its opinion on August 24, 2010. (App.1-2.) This Court has jurisdiction under 28 U.S.C. §1254(1) (2006) to review on writ of certiorari the Ninth Circuit's August 24, 2010 decision.

## CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

Respondents brought the underlying action under 42 U.S.C. §1983 (2006), which states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of

> any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Respondents allege petitioners violated their rights under the United States Constitution's Fourth Amendment, which provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

## STATEMENT OF THE CASE

### A. Background and District Court Proceedings.

Jerry Ray Bowen had a violent temper and had repeatedly physically assaulted his girlfriend, Shelly Kelly. Kelly decided to end the relationship and move out of her residence. (App.3; 1ER 121.) Fearing Bowen, she asked sheriff's deputies to stand by while she packed. When the deputies left to field a call, Bowen attacked her. He attempted to throw her off the second-story landing, bit her and tried to drag her by the hair back into the residence. When Kelly managed to run to her car, Bowen followed, holding "a black sawed-off shotgun with a pistol grip." (App.4.) Standing in front of the car, he pointed the gun at Kelly and shouted, "If you try to leave, I'll kill you bitch." (App.4.) Although Kelly managed to drive away, Bowen fired a shot at her, blowing out the car's left front tire. He then chased the car firing and missing four more times. (App.4.)

Kelly reported the attack and identified Bowen, a known Mona Park Crip gang member, from a photo lineup assembled by petitioner Curt Messerschmidt, a sheriff's detective. (App.4-5.) Kelly told Messerschmidt Bowen's current address was 2234 E. 120th St., Los Angeles. (App.5.) Messerschmidt confirmed Bowen resided there, which was the home of his foster mother, respondent Augusta Millender. (App.5, 8; 1ER 123.) Messerschmidt determined Bowen had a prior criminal record, was on summary probation for

spousal battery and driving without a license, had several previous felony convictions and misdemeanor arrests, and was a "third strike" candidate under California law. (App.8.)

Messerschmidt prepared an affidavit and warrants to arrest Bowen for assault with a deadly weapon and to search the 120th St. residence. (App.3-8.) The affidavit stated Messerschmidt had 14 years' experience as a peace officer, was a "Gang Investigator" in a special unit for gang-related crimes, and had considerable training and experience as a gang detective, including extensive knowledge concerning "manners in which gang related assaults are committed, the motives for such assaults, and the concealment of weapon(s) used in such assaults." (1ER 119-20.)

The affidavit recited Kelly's description of the assault, and stated Messerschmidt had "conducted an extensive background search" on Bowen using "departmental records, state computer records, and other police agency records," confirming Bowen resided at the location. (App.3-5; 1ER 121-123.) The affidavit requested night service of the search warrant because Bowen was affiliated with the Mona Park Crip gang and the nature of the crime – assault with a deadly weapon – showed "night service would provide an added element of safety to the community" and "the deputy personnel serving the warrant, based on the element of surprise." (App.5-6; 1ER 124.) The affidavit opined "recovery of the weapon could be invaluable" in successfully prosecuting Bowen and curtailing "further crimes." (App.5-6; 1ER 124.)

The affidavit did not mention Bowen's prior criminal record and felony convictions, although it noted Bowen "ha[d] gang ties to the Mona Park Crip gang based on information provided by the victim and the cal-gang database." (App.41 n.1; 1ER 124.)

The warrant allowed search and seizure of (1) items tending to establish the identity of persons in control of the premises, (2) all firearms and firearm-related items, and (3) articles of evidence showing, or relevant to, gang membership. (App.6-7, 10, 41.)

The warrants and affidavit were reviewed by Messerschmidt's superiors, including petitioner Sergeant Robert Lawrence and a lieutenant, and a deputy district attorney, before a magistrate approved them. (App.9.)

The Sheriff's Department's SWAT team served the warrants at 5:00 a.m. on November 6, 2003. (App.9.) Messerschmidt and Lawrence were present but did not participate in the search. (App.9.) The officers seized Augusta Millender's personal shotgun (a black 12-gauge "Mossberg" with a wooden stock), a box of .45 caliber "American Eagle" ammunition, and a letter from Social Services addressed to Bowen. (App.9.) The officers did not find Bowen or the sawed-off shotgun at the residence. (App.9.)

Plaintiffs filed suit under 42 U.S.C. §1983 against the County of Los Angeles, the Los Angeles County Sheriff's Department, Sheriff Leroy Baca, and 27 Los Angeles County deputies, including Messerschmidt and Lawrence. (App.10.) As relevant,

plaintiffs alleged violations of their Fourth Amendment rights. (App.10.) The parties filed cross motions for summary adjudication on the validity of the arrest and search warrants. (App.10.) The district court concluded the arrest warrant was facially valid and granted defendants' motion for summary adjudication on the issue. Plaintiffs did not appeal this ruling. (App.10.)

The district court also held the search warrant's authorization to search for all firearms, firearm-related materials, and gang-related items was unconstitutionally overbroad, but its authorization to search for evidence of control of the premises was constitutional. (App.10.) Accordingly, the court granted plaintiffs' motion for summary adjudication as to firearm- and gang-related evidence, but granted defendants' motion as to identification evidence. (App.10.) The district court then rejected the deputies' claim of qualified immunity, holding their actions were not objectively reasonable. (App.10.)

### B. The Appeal.

Messerschmidt and Lawrence appealed the denial of qualified immunity. (App.11.) On May 6, 2009, the Ninth Circuit reversed. (App.79-105.) Judges Callahan and Fernandez, in separate opinions, concluded defendants were entitled to qualified immunity. Judge Ikuta dissented. (App.79-105.)

Plaintiffs petitioned for rehearing, and on October 2, 2009, the Ninth Circuit ordered the case reheard

*en banc*. (App.77-78.) On August 24, 2010, the *en banc* panel issued a new opinion affirming the denial of qualified immunity. (App.1-39.)

First, the court held the warrant's authorization to search for all firearms and firearm-related materials was overbroad, because although the deputies had probable cause to search for the "black sawed-off shotgun with a pistol grip," the affidavit contained no evidence that Bowen possessed other firearms, that "such firearms were contraband or evidence of a crime," or that such firearms were likely present at plaintiffs' residence. (App.15-16, 24.)

Second, the court held the authorization to search for indicia of gang membership lacked probable cause, because the affidavit's statements that Bowen was a gang member did not suggest "'contraband or evidence of a crime' . . . would be found at [plaintiffs'] residence." (App.28-29, citation omitted.)

Finally, the court held the deputies were not entitled to qualified immunity, reasoning the affidavit was "'so lacking in indicia of probable cause as to render official belief in its existence unreasonable'" because the "affidavit indicated exactly what item was evidence of a crime, the black sawed-off shotgun with a pistol grip, and reasonable officers would know they could not undertake a general, exploratory search for unrelated items unless they had additional probable cause for those items." (App.31, 35, 38, citation omitted.)

Three judges dissented in two separate opinions. (App.39-76.) First, Judge Callahan, joined by Judge Tallman, found the officers had probable cause to search for firearms and firearm-related materials because Bowen had fired a sawed-off shotgun at a person in public and was a gang member and felon; thus, there was "a 'fair probability'" he had other firearms in his residence and they were "'contraband or evidence of a crime.'" (App.41-42, citation omitted.) Moreover, the officers' and residents' safety justified seizing any firearms encountered in the nighttime search for a dangerous felon. (App.42-43.)

All three dissenting judges found the warrant's authorization to search for gang-related indicia unconstitutionally overbroad, but concluded the officers were entitled to qualified immunity for that provision, as well as any alleged overbreadth in the authorization to search for firearms and firearm-related items. (App.72-73.)

Regarding gang-related items, the dissent[1] noted Messerschmidt knew Bowen had fired a sawed-off shotgun at a person in public and was a gang member and felon; he believed Bowen resided at plaintiffs' residence. (App.63.) Messerschmidt also had extensive experience with gang-related crimes, including "the manners in which gang-related assaults are committed, the motives for such assaults, and the

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[1] We refer to Judge Callahan's dissent simply as "the dissent," and to Judge Silverman's dissent by name.

concealment of weapon(s) used in such assaults." (App.64 n.17.) Thus, Messerschmidt could "reasonably have conceived of possible ties between the crime, the weapon and the gang." (App.63-64.)

In concluding the officers were entitled to qualified immunity as to both firearms and gang-related indicia, the dissent noted: (1) there was probable cause for a nighttime search of plaintiffs' residence (App.60-61); (2) the search and arrest warrants were facially valid (App.61); (3) Messerschmidt's superiors and a deputy district attorney approved the warrants (App.62); (4) there was no indication Messerschmidt acted dishonestly in procuring the warrant (App.62-63, 74); (5) when Messerschmidt sought the warrant, no clear precedent established it lacked probable cause (App.65-67); and (6) since the deputies undisputedly were entitled to search for disassembled parts of the sawed-off shotgun, the warrant's purportedly overbroad provisions did not expand the scope of the search (App.69).

## REASONS TO GRANT THE PETITION

In *United States v. Leon*, 468 U.S. 897 (1984) and *Malley v. Briggs*, 475 U.S. 335 (1986), this Court set a high bar for excluding evidence in a criminal proceeding or imposing civil liability under 42 U.S.C. §1983 on a police officer arising from obtaining and relying on an invalid warrant. Specifically, an officer was entitled to rely upon the magistrate's judgment so

long as the warrant documents were not "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." *Leon*, 468 U.S. at 923; *see also Malley*, 475 U.S. at 344-45. This standard struck a balance between encouraging police officers to apply for warrants, and deterring officers from outright misconduct. *Leon*, 468 U.S. at 916, 918, 920; *Malley*, 475 U.S. at 341, 343. Thus, civil liability or exclusion of evidence is appropriate only where it can be said that the officer, in seeking the warrant, was "plainly incompetent" or "knowingly violate[d] the law." *Malley*, 475 U.S. at 341.

Yet, the "so lacking in indicia of probable cause" standard has, over the past 24 years, degenerated to essentially no standard at all. Far from protecting police officers who reasonably seek a warrant from a magistrate before effecting an arrest or search, the standard has been applied on an *ad hoc* basis, resulting in imposition of liability on officers and exclusion of evidence in criminal proceedings where, at the end of the day, judges themselves disagree on the question of whether the underlying warrant was invalid.

The Ninth Circuit's decision here underscores the absence of any meaningful standards as to what constitutes "so lacking in indicia of probable cause" so as to impose civil liability on a police officer or exclude evidence in a criminal trial following a magistrate's approval of a warrant. Here, a suspect, a known gang member and felon, threatened to kill his girlfriend and fired a sawed-off shotgun at her in public. Before seeking a warrant to search the

suspect's residence, petitioners prepared an extensive affidavit and had the affidavit and application reviewed and approved by both their superiors and a deputy district attorney. A judge issued the warrant, authorizing search and seizure of all firearms and firearms-related materials, and indicia of gang membership. (App.6-9.)

The *en banc* majority concluded that there was no probable cause to search for any firearm other than the sawed-off shotgun, and no probable cause to search for indicia of gang membership, since the crime was not gang-related. (App.15-16, 24, 28-29.) It further found that the warrant was "so lacking in indicia of probable cause" that no reasonable officer could believe the warrant valid, and denied qualified immunity. (App.31-38.) It did so notwithstanding that two judges of its own court believed that there was probable cause to search for firearms, and three believed that the relationship between gang affiliation, the crime, the presence of firearms, and the danger presented by the search would lead a reasonable officer to believe that there might be probable cause to search for indicia of gang membership as well as firearms. (App.39-41, 72-73.)

Further, as the dissenting opinions noted, the officers' conduct in preparing a substantial affidavit and warrant application, and seeking review and approval by supervisors and an attorney, bespoke good faith, and the fine legal distinctions debated by the majority and the dissenters on the issue of probable cause mandated qualified immunity. (App.62, 72,

74.) A police officer, without legal training, cannot be penalized simply for guessing wrong as to how judges will eventually resolve a murky point of law.

That the "so lacking in indicia of probable cause" standard is bereft of substance is also illustrated by the numerous state and federal appellate decisions in which, notwithstanding sharp dissents concerning whether an underlying violation occurred at all, courts nonetheless find that no reasonable police officer could believe the warrant valid for purposes of invoking qualified immunity or allowing introduction of evidence. Even assuming the occasional judge acting outside of the judicial "mainstream," it would be untenable to suggest the appellate courts harbor so many judicial officers who are "plainly incompetent" or "knowingly violate the law." *Malley*, 475 U.S. at 341. Rather, the disturbing number of cases that have provoked dissents concerning the underlying constitutional violation and rejection of qualified immunity or suppression of evidence suggests that the "so lacking in indicia" standard is being misapplied on a routine basis.

It is essential that this Court grant review and provide clear standards for when a police officer's reliance on a warrant will be deemed reasonable for purposes of qualified immunity under section 1983 and the good-faith exception for admission of evidence under the Fourth Amendment. The amorphous "so lacking in indicia" test should be supplanted by specific criteria addressed to the core concern the Court expressed in *Leon* and *Malley* – that deliberate

misconduct by police officers be discouraged, and officers not punished and evidence not excluded simply because the officers relied on a judicial officer properly, but erroneously, carrying out his or her duties. Such criteria might include whether:

- Officers intentionally and recklessly gave the magistrate false information;

- The magistrate abandoned his or her neutral judicial role or was incapable of fulfilling it due to particular circumstances;

- The affidavit is "bare-bones" or insubstantial;

- The affidavit and other materials were reviewed by a supervisor or a district attorney prior to submission to the magistrate;

- Probable cause existed for the search even if the officers inadvertently, though reasonably given their responsibilities and circumstances, omitted facts establishing probable cause from the affidavit; and

- The warrant, even if overbroad, did not expand the scope of the search beyond areas properly searched if the warrant were narrowly tailored.

Application of such criteria will assure that the courts remain focused on the ultimate question of whether, in fact, police misconduct would be deterred by the imposition of liability or the exclusion of evidence. It grants proper deference to a magistrate's initial determination of probable cause and

an officer's reasonable reliance on such a determination, allowing it to be disturbed only upon satisfaction of specific objective criteria that go directly to the heart of the question of "good faith" in seeking and obtaining the warrant.

Police officers seek warrants on a routine basis, and it is essential that they be provided with firm guidance on how and when such conduct will result in liability or the exclusion of evidence at trial. Absent such clear standards, officers may be tempted to forego reasonable leads in investigating a matter, or to forego obtaining a warrant in borderline cases and rely instead upon established exceptions to the warrant requirement. This is bad law and worse policy. It is essential that this Court grant review.

## I. THE "SO LACKING IN INDICIA OF PROBABLE CAUSE" STANDARD WAS INTENDED TO SET A HIGH BAR FOR IMPOSING LIABILITY OR EXCLUDING EVIDENCE BASED UPON A POLICE OFFICER'S PROCURING A WARRANT SUBSEQUENTLY DETERMINED TO BE INVALID.

In a trio of cases, this Court has addressed the important and recurring issue of potential civil liability and exclusion of evidence in criminal cases arising from a police officer's having procured a warrant that is subsequently determined to be invalid. In each case, the Court has emphasized the need to strike a balance between deterring officers from engaging in deliberate misconduct and, at the same time,

encouraging officers to seek judicial intervention before effecting an arrest or search.

In *United States v. Leon*, 468 U.S. 897, the Court addressed the issue of whether evidence procured in violation of the Fourth Amendment by reason of an invalid warrant would nonetheless be admissible in a criminal proceeding. The Court held that so long as the officer procured or executed the warrant in objective good faith, the evidence would be admissible. *Id.* at 920-22.

The Court noted that it had expressed a "strong preference for warrants" because "'the detached scrutiny of a neutral magistrate . . . is a more reliable safeguard against improper searches than the hurried judgment of a law enforcement officer engaged in the often competitive enterprise of ferreting out crime.'" *Id.* at 913-14 (citations omitted). Moreover, because "[r]easonable minds frequently may differ on . . . whether a particular affidavit establishes probable cause, . . . the preference for warrants is most appropriately effectuated by according 'great deference' to a magistrate's determination." *Id.* at 914.

The Court reasoned further that the exclusionary rule is "designed to deter police misconduct" and should be applied "only in those unusual cases" where exclusion will further that purpose. *Id.* at 916-18. The Court emphasized that an officer ordinarily "cannot be expected to question the magistrate's probable cause determination or his judgment that the form of the warrant is technically sufficient." *Id.*

at 921. Thus, an officer was entitled to rely on a magistrate's determination, and any evidence procured would be admissible, absent some showing that the officer's reliance was, in no way, "objectively reasonable." *Id.* at 920, 922 n.23.

The Court explained that under this standard, evidence would be suppressed in only the most extraordinary circumstances, where the officer's conduct or reliance on the warrant bespoke bad faith. For example, an officer's reliance on a warrant would be unreasonable, and the evidence subject to suppression, where the officer intentionally or recklessly submitted false information to the magistrate, or where the magistrate "wholly abandoned his judicial role" and served as part of the prosecution team. *Id.* at 923. Or, a warrant "may be so facially deficient – *i.e.*, in failing to particularize the place to be searched or the things to be seized – that the executing officers cannot reasonably presume it to be valid." *Id.* The Court also concluded that suppression would be justified in those instances where it would be untenable for an officer to believe probable cause might exist – that is, where the affidavit is "'so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.'" *Id.* (citation omitted).

In *Malley v. Briggs*, 475 U.S. 335, the plaintiff sued police officers under 42 U.S.C. §1983 for having procured an arrest warrant without probable cause. Invoking *Leon*, and noting that qualified immunity turns "on the objective reasonableness" of the officers'

conduct, the Court held that qualified immunity should be denied "[o]nly where the warrant application is so lacking in indicia of probable cause as to render official belief in its existence unreasonable." *Id.* at 344-45.

The Court again emphasized that this was a high standard to meet – *i.e.*, that an officer could not be held liable simply because he or she was ultimately incorrect as to whether there was probable cause for arrest. The Court noted that it was not requiring "the police officer to assume a role even more skilled than the magistrate." *Id.* at 346 n.9. As the Court explained, since magistrates obviously are "more qualified than police officer[s]" to determine probable cause, "where a magistrate acts mistakenly in issuing the warrant but within the range of professional competence of a magistrate, the officer who requested the warrant cannot be held liable." *Id.* The Court underscored that qualified immunity would be denied in only the most egregious cases and would afford protection "to all but the plainly incompetent or those who knowingly violate the law." *Id.* at 341.

In *Groh v. Ramirez*, 540 U.S. 551 (2004), the plaintiffs sued federal agents under *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971), alleging that the officers had executed a facially invalid warrant against their property. Specifically, although the affidavit and warrant application specified the items to be searched and seized in the plaintiff's residence – a stockpile of firearms – the warrant itself did not list the items. *Id.* at 554-55.

The Court held that the warrant was invalid on its face because it did not specify the evidence sought. *Id.* at 557. The Court also denied qualified immunity, noting that the law was clearly established as to what was required on the face of the warrant. *Id.* at 563-65.

The Court acknowledged that in *Malley* it suggested that something more than mere negligence by a police officer was required in order to impose liability on a police officer for executing a warrant issued by a magistrate. *Groh*, 540 U.S. at 565. The Court noted, however, that in *Leon* it had observed that a warrant that failed to particularize the place to be searched or the things to be seized was so facially deficient that an executing officer could not reasonably presume it to be valid. *Id.* at 565, *citing Leon*, 468 U.S. at 923.

Significantly, in dissent, Justice Kennedy, joined by Chief Justice Rehnquist, concluded that since the warrant affidavit and application both specified the items to be seized, the omission from the warrant was nothing more than a clerical error and a reasonable "mistake of fact," given the numerous "serious responsibilities" an officer must fulfill in executing a search warrant for illegal weapons, including "difficult and important tasks" that "demand the officer's full attention in the heat of an ongoing and often dangerous criminal investigation." *Id.* at 567-68. As Justice Thomas, joined by Justice Scalia, similarly noted in dissent from the denial of qualified immunity, "[g]iven the sheer number of warrants prepared and executed by officers each year," including

"detailed" and sometimes "comprehensive" supporting documents, "it is inevitable that officers acting reasonably and entirely in good faith will occasionally make such errors." *Id.* at 579.

The Court's decisions in *Leon*, *Malley* and *Groh* underscore the core principle that police officers should be encouraged to seek warrants, and in all but the most egregious cases a magistrate's determination should insulate an officer from liability and permit the admission of evidence even where a warrant is subsequently determined to be invalid. Those cases where qualified immunity is to be denied or evidence excluded are confined to the most egregious circumstances where the officer's conduct is "plainly incompetent" or he has "knowingly violate[d] the law." *Malley*, 475 U.S. at 341.

Yet, as we discuss, the "objective reasonableness" standard has generated confusion and applications inimical to its purposes. In particular, the Court's directive that qualified immunity should be denied or evidence suppressed where an affidavit is "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable" is woefully open-ended, encouraging courts to adopt an "I know it when I see it" standard they cannot apply consistently. The resulting decisions deter officers not from misconduct, but from zealously performing their duties and from applying for warrants when they have probable cause to do so.

## II. THE NINTH CIRCUIT'S MISAPPLICATION OF THE *MALLEY/LEON* STANDARD DEMONSTRATES THE NEED FOR CLARIFICATION FROM THIS COURT.

As noted, in *Malley* and *Leon*, the court emphasized that officers were to be shielded from liability and evidence admitted notwithstanding a warrant subsequently determined to be invalid, absent the most egregious transgression by a police officer. As *Malley* succinctly put it, qualified immunity will protect "all but the plainly incompetent or those who knowingly violate the law." *Malley*, 475 U.S. at 341. Accordingly, to say that an officer sought a warrant "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable" is tantamount to saying that the officer's conduct was flatly incompetent or intentionally illegal. *Leon*, 468 U.S. at 923; *see Malley*, 475 U.S. at 344-45.

However, as the Ninth Circuit's decision here demonstrates, in practice the "so lacking in indicia of probable cause" standard has been stripped of any substance. It results in the imposition of liability where it stretches credibility to assert that the police officers were "incompetent" or "knowingly violate[d] the law."

The *en banc* majority held that the search warrant was invalid in that it allowed search and seizure of all firearms and not simply a sawed-off shotgun of the sort used in the attack. (App.24.) The court also found the warrant invalid insofar as it allowed a

search for evidence concerning gang affiliation because there was no indication that the assault was gang-related. (App.28-29.) Moreover, the majority found that the issue of probable cause was so clear that the officers were not entitled to immunity, *i.e.*, that the warrant was so lacking in indicia of probable cause that no reasonable officer should have attempted to procure it. (App.35-36, 38.)

In short, in the language of *Malley*, the court essentially found that the officers' actions were "incompetent" or "knowingly violate[d] the law." *Malley*, 475 U.S. at 341.

What is striking is that the *en banc* majority so holds, notwithstanding the fact that two of its colleagues disagreed with its resolution of the probable cause issue. (App.41, 73.) While it is doubtful that the *en banc* majority believes its colleagues to be incompetent or supporting a knowing violation of the law, that would be the plain implication if in fact the majority was applying the rigorous test for qualified immunity articulated by this Court in *Malley*. As a review of the dissents reveals, the probable cause issue was a close one, and the circumstances surrounding procurement of the warrant bespoke the officers' good faith.

Probable cause exists when, given the totality of the circumstances, "there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Illinois v. Gates*, 462 U.S. 213, 238 (1983). This is a "'practical, nontechnical conception'"

that permits law enforcement officers to formulate "common-sense conclusions about human behavior." *Id.* at 231-32 (citation omitted). Reviewing courts should pay "great deference" to a magistrate's determination of probable cause. *Id.* at 236.

As the dissent observed, the officers had probable cause to search for all firearms and firearm-related materials at plaintiffs' residence. The real object of the search and accompanying arrest warrant was Bowen, who Messerschmidt believed resided at the location. (App.41.) Bowen was reasonably considered armed and dangerous. He had recently threatened to kill his girlfriend, had attempted to do so by firing a sawed-off shotgun – which he apparently kept handy – at her in public, and was a member of a street gang, a group organized for criminal activity and known to use firearms illegally on people. (App.41-42.)

Messerschmidt's affidavit recounted his extensive experience investigating gang activity, including "concealment of weapon(s) used in [gang-related] assaults." (App.64 n.17.) Messerschmidt also knew Bowen had previous felony convictions and was a "third strike candidate" under California law. (App.8, 41-42.) Because of Bowen's dangerousness, the magistrate approved the warrant for night service, and the district court found such service justified. (App.41.)

Given the circumstances, the officers had probable cause to search for and seize all firearms in plaintiffs' residence. Bowen likely had other firearms

besides the sawed-off shotgun, kept them where he resided, and would use them on Kelly or the officers. California law allows issuance of a search warrant for items possessed "with the intent to use them as a means of committing a public offense," Cal. Penal Code §1524 (West 2000), and the warrant recited this authorization. (1ER 115.) Thus, the officers could legitimately seize all firearms Bowen might use to carry out his threat to kill Kelly.

Moreover, numerous laws render it criminal for felons to possess firearms. *E.g.*, Cal. Penal Code §12021(a)(1) (West 2009); 18 U.S.C. §922(g) (2006). Thus, there was at least a "fair probability" firearms at plaintiffs' residence would be "contraband or evidence of a crime." (App.42.) Significantly, other circuits have held a warrant to search for all firearms at a convicted felon's residence is not overbroad even if the alleged crime involved a specific weapon, because felons cannot lawfully possess firearms. *United States v. Campbell*, 256 F.3d 381, 389 (6th Cir. 2001); *United States v. Sanders*, 351 F.App'x 137, 139 (7th Cir. 2009).

Additionally, because "firearms are inherently dangerous," as the dissent explained, the officers' and residents' safety "requires that officers seeking the nighttime arrest of a dangerous felon be allowed to seize any firearm that they come across in their search for that individual or for evidence that is otherwise properly covered by the search warrant. Indeed, securing any weapons found during the

search is justified to protect the officers executing the warrant from harm while doing so." (App.42-43.)

The majority notes the affidavit did not explicitly say Bowen was a convicted felon and a "third strike" candidate, although Messerschmidt undisputedly knew these facts when he sought the warrant. (App.8, 25 & n.7.) But these facts could reasonably be inferred from the affidavit's other facts – specifically, the nature of the crime, the type of weapon used, and Bowen's gang membership.[2] Even had the officers not known Bowen was a felon and "third strike" candidate, the affidavit's other facts are sufficient to support the magistrate's determination that probable cause existed to search for firearms and firearm-related materials.

More important, for qualified immunity purposes, a reasonable officer could *believe* the above facts – with or without the statement that Bowen was a felon and "third strike" candidate – established probable cause, and submit any doubt to a magistrate. Indeed, assuming the warrant was deficient because the affidavit did not say Bowen was a felon and "third strike" candidate, this omission was a reasonable "mistake of fact" to which qualified immunity should apply. *See Groh*, 540 U.S. at 567-68 (Kennedy, J., dissenting). The affidavit was not "bare-bones" and

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[2] Moreover, the affidavit stated Messerschmidt knew Bowen was a Mona Park Crip gang member based partly on information in "the cal-gang database." (1ER 124; App.41 n.1.)

conclusory. *See Leon*, 468 U.S. at 915; *Gates*, 462 U.S. at 239. Rather, it detailed Bowen's assault on Kelly, Messerschmidt's background search on Bowen, Messerschmidt's experience with gangs and their use of weapons, and why night service was warranted. (1ER 119-24.) In the course of investigating Bowen's crime and performing the numerous tasks surrounding obtaining and executing the warrant, Messerschmidt could reasonably fail to recognize he had omitted this information. *See Groh*, 540 U.S. at 567-68 (Kennedy, J., dissenting), 579 (Thomas, J., dissenting).

As to the search for gang-related items, the dissent explains that when Messerschmidt prepared his affidavit, he knew Bowen had fired a sawed-off shotgun at a person in public, was a felon, and was a gang member. (App.63.) The affidavit recounted Messerschmidt's extensive training and experience in gang-related crimes, including "the manners in which gang-related assaults are committed, the motives for such assaults, and the concealment of weapon(s) used in such assaults." (App.64 n.17; 1ER 120.) When he applied for the warrant, he did not know Bowen's assault on Kelly was not gang-related; given what he knew, he could reasonably have believed otherwise. (App.64.) Moreover, as Judge Silverman explained in his dissent, "[h]ad Mona Park Crip paraphernalia been found in close proximity to guns during the search of [plaintiffs'] house – say, a gun concealed in Mona Park Crip clothing – such a discovery would have tended to prove that the guns were Bowen's"

and not plaintiffs'. (App.75.) In short, even if ultimately these facts do not establish probable cause, Messerschmidt could reasonably have thought there might be sufficient probable cause to submit the issue to his superiors, a deputy district attorney, and eventually a magistrate. (App.64.)

As this Court made clear in *Malley* and *Leon*, this is precisely what we want officers to do. Allowing officers to reasonably rely upon a magistrate's determination of probable cause encourages officers to procure warrants in lieu of effecting warrantless searches and arrests. *Malley*, 475 U.S. at 346 n.9, 353-54 (Powell, J., concurring & dissenting); *Leon*, 468 U.S. at 913-14. The temptation to forego a magistrate's determination of probable cause and to rely instead upon borderline exigent circumstances to justify a warrantless search would be particularly strong in a case such as this one involving an assault with a deadly weapon by a known felon and gang member who presents an imminent danger to the public.

Here, petitioners properly sought judicial approval for their actions. There is no accusation that they deliberately omitted or manufactured any information in order to procure the warrant. Nor is there any indication they would have reason to believe that the magistrate was acting in other than an impartial manner after careful reflection.

As the dissent noted, certainly no case law would have put the officers on notice that their conduct was improper, let alone so improper as to render them "incompetent" or knowingly violating the law. Two prior Ninth Circuit decisions denying qualified immunity involved facially invalid warrants, not a facially valid warrant of the sort at issue here. (App.65-67 [discussing *United States v. Kow*, 58 F.3d 423 (9th Cir. 1995), and *United States v. Stubbs*, 873 F.2d 210 (9th Cir. 1989)]; *see also* App.56-57.) Moreover, the Ninth Circuit had applied qualified immunity in *Ortiz v. Van Auken*, 887 F.2d 1366, 1367-68 (9th Cir. 1989), where, as here, a deputy district attorney as well as the magistrate reviewed the warrant and it was not facially overbroad. *Id.* at 1370-71. (App.55-56 & n.11.)

As this Court commented in *Gates*, probable cause deals not with "hard certainties," but "probabilities." 462 U.S. at 231. Law enforcement officers are expected to "formulate[ ] certain common-sense conclusions about human behavior," and the search for evidence "must be seen . . . not in terms of library analysis by scholars, but as understood by those versed in . . . law enforcement." *Id.* at 232. Accordingly, probable cause depends on the "totality of the circumstances" and "courts should not invalidate warrant[s] by interpreting affidavit[s] in a hypertechnical, rather than commonsense, manner." *Id.* at 231, 233, 236 (citation omitted). Similarly, application of qualified immunity turns on whether an officer's conduct was objectively reasonable, *Malley*, 475 U.S.

at 344 – considered, as the dissents in *Groh* noted, in the context of an officer's day-to-day realities in investigating crime. *Groh*, 540 U.S. at 567-68 (Kennedy, J., dissenting), 578-79 (Thomas, J., dissenting).

The majority reads the affidavit with the mindset of legal technicians or lawyers preparing a case for trial, not an officer conducting a criminal investigation. The search for evidence is often circuitous, based on inferences drawn from common sense and an officer's law enforcement experience. Both the evidence sought and the evidence supporting the search may be circumstantial rather than direct, and officers may seek evidence ultimately inadmissible or irrelevant at trial, because it may lead to other, admissible evidence. Considering this process, it is entirely reasonable for an officer to believe a gang member who had fired a sawed-off shotgun at his girlfriend in public and threatened to kill her might have other firearms and keep them where he resided, the assault might have been gang-related, and a magistrate might constitutionally authorize the search for such evidence.

The Ninth Circuit's decision directly undermines both law enforcement and the Fourth Amendment by effectively discouraging recourse to the warrant procedure. As the dissent noted, "the majority's parsing of the search warrant will lead to uncertainty and needless litigation" by creating "considerable incentive to challenge all but the narrowest warrants." (App.70-71.) This "parsing" is only made possible

by virtue of the Ninth Circuit's loose standard for determining when a warrant is "so lacking in indicia of probable cause" that no reasonable officer could rely on it.

It is essential that this Court grant review to clarify the *Leon/Malley* standards and assure that courts make a determination of qualified immunity – and in the context of criminal cases, exclusion of evidence under *Leon* – with due consideration of the practical realities of law enforcement and the ultimate goal of deterring gross misconduct, without discouraging reasonable investigative practices.

## III. REVIEW IS NECESSARY TO CLARIFY THE *MALLEY/LEON* STANDARDS BECAUSE FEDERAL AND STATE COURTS CANNOT CONSISTENTLY APPLY THE "SO LACKING IN INDICIA OF PROBABLE CAUSE" TEST.

As noted, the standard for excluding evidence under *Leon* or denying qualified immunity under *Malley* in cases where a police officer procures a warrant from a magistrate is a very high one – the officer's action in procuring a warrant must essentially be "incompetent" or in knowing violation of the law. Thus, evidence should be excluded, and immunity denied, only in the clearest cases. If a legal question is even remotely debatable, it would seem to fall outside the *Leon/Malley* standard.

Nonetheless, review of appellate decisions from both federal and state courts applying the "so lacking in indicia of probable cause" standard, in the context of both civil rights and criminal cases, reveals a large and disturbing number of cases where immunity is denied or evidence is excluded notwithstanding a strong disagreement among members of the court as to whether a constitutional violation occurred at all. While it is certainly true that reasonable minds may differ on a point of law, and even appellate judges can make the occasional egregious error, both the number and nature of cases in which there have been dissenting opinions on the core constitutional issue and the objective reasonableness of officers' actions strongly suggest that the *Malley/Leon* standard is not being applied with the rigor which this Court intended. Qualified immunity is being denied, and evidence is being excluded, in a large number of cases in which, notwithstanding the majority's incantation of the *Malley* standard, there is serious dispute as to whether a constitutional violation occurred in the first instance.

For example, in *Poolaw v. Marcantel*, 565 F.3d 721, 730-32 (10th Cir. 2009), the Tenth Circuit denied qualified immunity for a warrant to search a homicide suspect's in-laws' property. Although the majority held that the warrant was so lacking in indicia of probable cause that no reasonable officer would have relied upon it, the dissent found ample grounds for probable cause, noting that the officers could reasonably presume the suspect would seek assistance from

his pregnant wife, who had stayed at her parents' property the night of the murder and had behaved peculiarly the next morning, indicating she had contact with the suspect. *Id.* at 739-40 & n.1, 741. The dissent explained that at the very least qualified immunity should apply, noting that the affidavit was not "bare-bones," the officers followed proper procedures, and there was no factually on-point case law. *Id.* at 744-45, 747.

Similarly, in *Ruby v. Horner*, 39 F.App'x 284 (6th Cir. 2002), the Sixth Circuit denied qualified immunity over a strong dissent. There, the suspect's residence was in the same building as a restaurant owned by his brother, the plaintiff. *Id.* at 285. The court held that there was no probable cause to search the restaurant, and that no reasonable officer could have believed so based upon the facts. *Id.* at 287. The dissent noted, however, that there were ample facts to support a reasonable police officer's belief in probable cause. Specifically, the dissent observed that the officers had received multiple tips that the suspect was selling drugs from the restaurant, the suspect had ready access to the restaurant, and the police obtained the warrant only after the suspect was arrested with cocaine. *Id.* at 288.

Given the ubiquitous nature of suppression proceedings, it is not surprising that departure from the *Malley/Leon* standard is particularly pronounced in criminal appeals. For example, in *United States v. Zimmerman*, 277 F.3d 426, 429, 431 (3d Cir. 2002), officers obtained a warrant to search for adult and

child pornography, including searching computer equipment, at the residence of a high school coach who allegedly molested students. The Third Circuit suppressed child pornography seized during the search. *Id.* at 431-34.

Then-Judge Alito dissented, concluding probable cause supported the warrant. *Id.* at 439-40. The affidavit stated defendant had repeatedly molested and shown students a pornographic video clip, suggesting the video had been downloaded. Moreover, defendant's use of pornography in his extended course of conduct, including at home, suggested he possessed similar materials there; and the affidavit contained information that pedophiles often collect child pornography and use adult pornography in victimizing minors. *Id.* at 440.

Judge Alito further applied the good-faith exception, commenting "there is no bright line between fresh and stale probable cause," especially given the "'protracted and continuous'" criminal activity alleged. *Id.* (citation omitted). Moreover, the magistrate and the district court had also found probable cause. *Id.*

Numerous other federal cases suppressing evidence have produced dissents on the good-faith exception. *See*:

- *United States v. McPhearson*, 469 F.3d 518, 524, 527-28 (6th Cir. 2006) (majority holds that warrant failed to establish nexus between place to be searched

and evidence sought; dissent concluded good-faith exception should apply because affidavit stated that police arrested defendant leaving his residence and found 6 grams of cocaine in his pocket; "It is a reasonable inference that at least some people who carry crack cocaine around with them in their homes would leave some of the contraband . . . elsewhere in their homes," and "only a police officer with extraordinary legal training would have detected any potential deficiencies in the affidavit because it failed to articulate this inference");

- *United States v. Laughton*, 409 F.3d 744, 746, 753 (6th Cir. 2005) (similar holding; dissent applied good-faith exception because warrant listed address to be searched, and statements that defendant kept drugs in his "residence" could be linked to that address; not to do so was "an unwarranted hypertechnicality"; also, affidavit went well beyond "bare-bones" and a county prosecutor approved it);

- *United States v. Helton*, 314 F.3d 812, 815, 825-26 (6th Cir. 2003) (dissent reasoned that 27-page affidavit contained information about telephone calls and "stacks" of money in house; informant had been told the money belonged to a drug trafficker and defendant's girlfriend was storing it because she had no criminal record; "'line-by-line scrutiny [is] . . . inappropriate in reviewing [a] magistrate's

decisions'" and "'a hypertechnical critique of warrants would only, in the end, encourage warrantless searches'" (citations omitted));

- *United States v. Hove*, 848 F.2d 137, 139-41 (9th Cir. 1988) (warrant to search suspect's father's residence; dissent reasoned officer could conclude defendant resided there because 5-page affidavit indicated she might have been residing in the area, and affidavit linked bombing incident to automobiles to be searched at father's address; also, officer had seen toys and defendant's car at the father's address, connecting the residence to defendant, and the officer's "misconduct" in "fail[ing] to catch the stenographer's error in transcribing" these facts into the affidavit was "not the type of flagrant misconduct meant to be deterred under the exclusionary rule");

- *United States v. Luong*, 470 F.3d 898, 901, 904-05 (9th Cir. 2006) (refusing to consider facts outside affidavit to show that officers acted in good faith; dissent found good-faith exception applicable because agent orally gave issuing judge additional facts to support "colorable" probable cause determination).

State appellate decisions suppressing evidence under the "so lacking in probable cause" standard from *Malley* and *Leon* have also spawned numerous

dissents, on both probable cause and the good-faith exception. *See*:

- *People v. Gutierrez*, 222 P.3d 925, 949-50, 952 (Colo. 2009) (dissent concluded search warrant established probable cause to search tax preparer's office for identity-theft evidence because tax preparer admitted she helped taxpayers file tax returns under false tax identification numbers);
- *People v. Miller*, 75 P.3d 1108, 1117-19 (Colo. 2003) (dissent concluded affidavit established probable cause and was not based on "stale" information, because it alleged ongoing criminal activity; "[h]aving a good faith exception serves little purpose if acting in good faith means nothing more than accurately predicting the ultimate conclusion of the courts");
- *People v. Leftwich*, 869 P.2d 1260, 1278-79 (Colo. 1994) (dissent found probable cause supported search warrant because police corroborated informant's non-criminal information, and found good-faith exception applicable because officer's supervisor, legal advisor, and deputy district attorney approved affidavit);
- *State v. Gales*, 757 N.E.2d 390, 398-99 (Ohio App. 2001) (dissent was "at a loss to understand" how the majority could conclude a search warrant affidavit lacked probable cause; "the majority opinion would . . . seem to require that

magistrates . . . disregard circumstantial evidence in determining . . . probable cause");

- *State v. Dalpiaz*, 783 N.E.2d 976, 983-84, 988-90 (Ohio App. 2002) (dissent concluded search warrants for illegal drugs were not overbroad where defendant was suspected of growing marijuana; "a witness does not have to see someone bite off another's ear to testify against the biter. It is sufficient that the witness merely sees the biter spit out the ear to give credibility to the witness's testimony");

- *State v. Young*, 765 N.E.2d 938, 942-43, 947, 950-51 (Ohio App. 2001) (dissent found probable cause and applied good-faith exception where officers obtained search warrant for drugs and related contraband in defendant's residence after observing a marijuana baggie and hemostat there; warrant was not facially deficient, there was "no police illegality to deter," and since the majority found probable cause to search for marijuana and related paraphernalia, the warrant's purported overbreadth did not expand the scope of the search);

- *Kelley v. State*, 269 S.W.3d 326, 333-37 (Ark. 2007) (dissent applied good-faith exception to nighttime search warrant because affidavit contained facts that could support a nighttime search, and

officer gave issuing judge additional facts supporting nighttime search);

- *State v. Hollis*, 649 N.E.2d 11, 17-18 (Ohio App. 1994) (dissent applied good-faith exception because affidavit described long-standing history of illicit sexual activities, recent sale of material officer believed was "obscene" at defendant's residence, and a 5-year investigation; "If [the issuing] judge did not recognize the 'staleness' or the necessity for a judicial determination of 'obscenity,' I do not find it surprising that the officers . . . did not have a greater degree of legal perspicuity. . . .");

- *Agurs v. State*, 998 A.2d 868, 895, 898 (Md. 2010) (dissent applied good-faith exception because affidavit was not "bare-bones" and stated facts "sufficient to allow reasonable officers . . . to believe that there was a fair probability that [defendant's] house contained evidence of his suspected drug activity");

- *State v. Belmontes*, 615 N.W.2d 634, 644-46 (S.D. 2000) (dissent applied good-faith exception because affidavit was not "bare-bones," and officers had reason to believe informant was reliable although they failed to include that information in the affidavit; the majority's decision "requires that a law enforcement officer . . . possess a more sophisticated understanding of this area of the law than is

> required of a judge. . . . Rather than promote the use of warrants . . . [the majority's reasoning] invites abandonment of applications for a search warrant by law enforcement in the more promising hope that a warrant exception may come to the officer's rescue");
>
> - *Commonwealth v. Shelton*, 766 S.W.2d 628, 630-31 (Ky. 1989) (dissent applied good-faith exception because officers relied on a facially valid search warrant, though issued by a commissioner lacking jurisdiction).

Again, while it is certainly true that reasonable judges may differ on points of law and dissents are to be expected, the number and nature of dissents in cases involving the *Malley/Leon* standard is troubling. If, as this Court has repeatedly held, police officers may rely upon a magistrate's determination of probable cause absent the most egregious circumstances, *i.e.*, where the officer is incompetent or deliberately violating the law, then it is disturbing, to say the least, that numerous appellate jurists, as demonstrated by their dissents, are similarly "incompetent" or willing to "deliberately violate the law."

That such a proposition is preposterous underscores the wide gap between the *Malley/Leon* standards as announced by this Court, and application of those standards in practice. It is vital that this Court grant review to further clarify the circumstances in which a police officer will be held liable, or evidence

will be excluded, based upon having procured a warrant subsequently determined to be invalid.

## IV. REVIEW IS NECESSARY TO CLARIFY OR RECONSIDER THE "SO LACKING IN INDICIA" STANDARD AND TO PROVIDE SPECIFIC GUIDELINES FOR RESOLVING QUALIFIED IMMUNITY AND SUPPRESSION ISSUES.

As explained above, the Ninth Circuit's decision in this case, as well as the startling number of appellate decisions with sharp dissents concerning application of the *Malley/Leon* standard, underscore the need for this Court to revisit and clarify the circumstances under which evidence will be excluded or liability imposed when an officer procures a warrant that is subsequently determined to be invalid.

The "so lacking in indicia of probable cause" standard is, at this point, little more than a talisman invoked to explain the ultimate conclusion that an officer is not entitled to qualified immunity or evidence must be suppressed, untethered to any specific standard. While paying lip service to the standard qualified immunity inquiry as to whether the law was "clearly established," as this case illustrates, immunity is being rejected in circumstances where it can hardly be said that the officers were "incompetent" or essentially acting deliberately in violation of the law based upon what they should have believed the legal standard to be. The fact that two circuit judges themselves would have found

probable cause for the search should cause any court to pause before proclaiming that the law is "clearly established" so that any reasonable officer would know that the warrant was so "lacking in indicia of probable cause."

As this Court emphasized in *Leon* and *Malley*, a magistrate's determination of probable cause is entitled to deference, and an officer's reliance on that determination should not be found unreasonable absent the clearest cases of misconduct, where exclusion of evidence or denial of immunity would deter future misconduct. It most assuredly is not proper where a warrant fails because of a mere technicality or there is a serious debate as to whether probable cause existed at all.

Petitioners submit that the Court should grant review for purposes of reconsidering, or at least clarifying, what it means for a warrant to be "so lacking in indicia of probable cause" that no reasonable law enforcement officer could rely upon it. Such a standard must surely be more than a simple failure by the officer to discern or resolve subtle points of law. Indeed, given the court's statement in *Malley* that immunity should be denied only where the officer is plainly incompetent or knowingly violates the law, it may well be that liability is warranted only where it can be said that the officer's conduct was completely reckless, *i.e.*, without any legal or logical basis to seek the warrant in the first instance.

In addition, the Court could make it clear that the lower courts are required to consider the totality of circumstances surrounding procurement of the warrant in determining whether an officer's conduct is so egregious as to fall outside the scope of qualified immunity or justify exclusion of evidence. Actions which bespeak good faith and reasonable conduct by the officer, such as submission of a detailed (as opposed to "bare-bones") affidavit and application, seeking review by superiors and/or an attorney prior to the submission to the magistrate, or submission in such a manner as to allow proper reflection by the magistrate, are the proper touchstones for determining whether qualified immunity applies or evidence should be excluded.

Pragmatic factors should also be considered. These might include whether probable cause existed for the search, even if officers may have inadvertently omitted facts establishing probable cause from an application or affidavit. Or whether a warrant, even if overbroad, did not expand the scope of the search beyond areas properly searched if the warrant had been narrowly tailored.

Requiring courts to specifically consider these factors will allow imposition of liability and exclusion of evidence in the most appropriate cases where an officer has misled the magistrate through providing false or misleading information, the judicial officer has abdicated his or her independent role in reviewing evidence, and at bottom, there is no meaningful

judicial evaluation of probable cause in the first instance. At the same time, application of such standards will foreclose liability in cases such as this one, where, as the dissenting judges noted, the police officers did everything they reasonably could to procure a valid warrant to search for evidence and a suspect in a serious criminal matter.

If, as this Court stated in *Malley* and *Leon*, qualified immunity is unavailable or evidence should be excluded in a criminal proceeding only where an officer's conduct in relying on a warrant is so egregious that he can be said to be "incompetent" or "deliberately violat[ing] the law," it is essential that this Court grant review to halt the wholesale departure from this rigorous standard.

## CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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**FOR PUBLICATION**

**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

AUGUSTA MILLENDER;
BRENDA MILLENDER;
and WILLIAM JOHNSON,

*Plaintiffs-Appellees,*

v.

COUNTY OF LOS ANGELES;
ROBERT J. LAWRENCE (292848);
CURT MESSERSCHMIDT (283271),

*Defendants-Appellants,*

and

LOS ANGELES COUNTY SHERIFF'S DEPARTMENT; LEROY D. BACA; SCOTT WALKER (188188); RICK RECTOR (280600); DONALD NICHIPORUK (213625); RICHARD SCHLEGEL (280735), e/s/a M. SCHLEGEL; BRICE STELLA (402018), e/s/a D. STELLA; JACK DEMELLO (223333), e/s/a J. DERNELLO; DAVID O'SULLIVAN (293952); JACK RITENOUR (164927); and IAN STADE (279464),

*Defendants.*

No. 07-55518

D.C. No.
CV-05-02298-DDP

OPINION

Appeal from the United States District Court
for the Central District of California
Dean D. Pregerson, District Judge, Presiding

Argued and Submitted
December 14, 2009 – San Francisco, California

Filed August 24, 2010

Before: Alex Kozinski, Chief Judge,
Pamela Ann Rymer, Barry G. Silverman,
Susan P. Graber, Raymond C. Fisher,
Richard C. Tallman, Johnnie B. Rawlinson,
Jay S. Bybee, Consuelo M. Callahan,
Milan D. Smith, Jr. and
Sandra S. Ikuta, Circuit Judges.

Opinion by Judge Ikuta;
Dissent by Judge Callahan;
Dissent by Judge Silverman

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## COUNSEL

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Robert Mann, Esq., Mann & Cook, Los Angeles, California, attorneys for the appellees.

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## OPINION

IKUTA, Circuit Judge:

Plaintiffs Augusta Millender, Brenda Millender, and William Johnson (collectively, "the Millenders") filed this suit under 42 U.S.C. § 1983 against the

County of Los Angeles, the Los Angeles County Sheriff's Department, and several individual members of the Sheriff's Department, alleging violations of their civil rights. Their complaint arose from a search pursuant to a warrant obtained by Detective Curt Messerschmidt of the Los Angeles County Sheriff's Department and executed under the supervision of Sergeant Robert Lawrence. Messerschmidt and Lawrence (collectively, "the deputies") appeal from the district court's determination that they were not entitled to qualified immunity with respect to the alleged overbreadth of the search warrant. Because the challenged sections of the warrant were "so lacking in indicia of probable cause as to render official belief in its existence unreasonable," *Malley v. Briggs*, 475 U.S. 335, 345 (1986), we affirm.

## I

On November 4, 2003, Messerschmidt applied for an arrest warrant for Jerry Ray Bowen at 2234 E. 120th St., Los Angeles, and for a warrant to search that address and seize specified property in connection with "a spousal assault and an assault with a deadly weapon." Messerschmidt prepared an affidavit, entitled "Statement of Probable Cause." The affidavit contained the following facts: The victim of the assault, Shelly Kelly, stated that she had a "dating relationship" with the suspect, Bowen. Kelly decided to end the relationship due to Bowen's violent temper and because Bowen had previously physically assaulted her. Because of Bowen's violent nature,

Kelly asked the Sheriff's Department to send officers to protect her while she gathered some of her property from the residence that she and Bowen shared. Once the requested officers arrived, Kelly began to move her property to her car. After approximately twenty minutes, the officers received an emergency call and had to leave, saying they would return after they handled the call.

According to Kelly, as soon as the officers left, Bowen appeared and screamed, "I told you to never call the cops on me bitch!" Bowen physically assaulted Kelly and attempted to throw her over the top railing of the second story landing of their residence. Bowen grabbed Kelly, bit her, and tried to drag her by the hair back into their residence. When Kelly resisted by bracing herself against the door, Bowen grabbed both of Kelly's arms, but Kelly was able to slip out of her shirt and run to her car. Bowen followed seconds later, now holding "a black sawed off shotgun with a pistol grip." Standing in front of Kelly's car, Bowen pointed the shotgun at Kelly and shouted, "If you try to leave, I'll kill you bitch." Kelly was able to escape by leaning over in her seat and flooring the gas. Bowen jumped out of the way and fired one shot at her, blowing out the front left tire of Kelly's car. Chasing the car on foot, Bowen fired four more times in Kelly's direction, missing her each time.

Shortly after, Kelly located police officers who immediately recognized her as the same person they had been protecting before they left for the emergency call. Kelly reported the shooting, described Bowen's

firearm as a "black sawed off shotgun with a pistol grip," and gave the officers four photos of Bowen to aid their investigation.

Based on this information, Messerschmidt put a photo of Bowen into a "six pack" line-up. When Messerschmidt showed the photo line-up to Kelly, she immediately identified Bowen and circled his picture. Messerschmidt's affidavit states that "[t]he person [Kelly] identified is Jerry Ray Bowen . . . , a known Mona Park Crip gang member." Kelly told Messerschmidt that Bowen's current address was 2234 E. 120th St., Los Angeles.

Messerschmidt requested a "Ramey Warrant" to arrest Bowen, because Kelly knew him personally and identified him as the person who physically assaulted and shot at her.[1] According to the affidavit, Messerschmidt conducted an "extensive background search" on Bowen using "departmental records, state computer records, and other police agency records." Using these records and information provided by Kelly, Messerschmidt confirmed that Bowen resided at 2234 E. 120th St. in Los Angeles.

Messerschmidt's affidavit also requested night service of the search warrant, giving two reasons.

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[1] A "Ramey warrant" is a warrant authorizing the arrest of a suspect within the home before the filing of criminal charges by the district attorney. *Goodwin v. Superior Court*, 108 Cal. Rptr. 2d 553, 555 (Ct. App. 2001) (citing *People v. Ramey*, 545 P.2d 1333 (Cal. 1976)).

First, "the investigation has shown that the primary suspect in this case has gang ties to the Mona Park Crip gang based on information provided by the victim and the cal-gang data base." Second, Messerschmidt believed that "the nature of the crime (Assault with a deadly weapon) goes to show that night service would provide an added element of safety to the community" as well as to those personnel serving the warrant. The affidavit concluded by stating that Messerschmidt "believes that the items sought will be in the possession of Jerry Ray Bowen and the recovery of the weapon could be invaluable in the successful prosecution of the suspect involved in this case, and the curtailment of further crimes being committed."

In addition to preparing the affidavit, Messerschmidt completed a "Search Warrant and Affidavit" form to authorize the search of the residence identified in "Attachment 1" and the seizure of property identified in "Attachment 2." Attachment 1 identifies the "location to be searched" as 2234 E. 120th St. in Los Angeles. Attachment 2 sets out two categories of items to search and seize. The first paragraph lists:

> All handguns, rifles, or shotguns of any caliber, or any firearms capable of firing ammunition, or firearms or devices modified or designed to allow it to fire ammunition. All caliber of ammunition, miscellaneous gun parts, gun cleaning kits, holsters which could hold or have held any caliber handgun being

> sought. Any receipts or paperwork, showing the purchase, ownership, or possession of the handguns being sought. Any firearm for which there is no proof of ownership. Any firearm capable of firing or chambered to fire any caliber ammunition.
>
> The second paragraph lists:
>
> Articles of evidence showing street gang membership or affiliation with any Street Gang to include but not limited to any reference to "Mona Park Crips", including writings or graffiti depicting gang membership, activity or identity. Articles of personal property tending to establish the identity of person [sic] in control of the premise or premises. Any photographs or photograph albums depicting persons, vehicles, weapons or locations, which may appear relevant to gang membership, or which may depict the item being sought and or believed to be evidence in the case being investigated on this warrant, or which may depict evidence of criminal activity. Additionally to include any gang indicia that would establish the persons being sought in this warrant, affiliation or membership with the "Mona Park Crips" street gang.

An additional attached affidavit recounts Messerschmidt's experience in gang investigations. The Search Warrant includes Messerschmidt's attestation that the incorporated affidavit is true and the property described in Attachment 2 is lawfully seizable.

Messerschmidt also drafted a "Probable Cause Arrest Warrant and Affidavit in Support Thereof" to authorize the arrest of Bowen, which again states his address as 2234 E. 120th St., Los Angeles. This arrest warrant application incorporates Messerschmidt's affidavit by reference.

Messerschmidt was aware of other relevant facts not included in the affidavit. First, Kelly explained to Messerschmidt that the address she gave him, 2234 E. 120th St., was the home of Bowen's foster mother, Augusta Millender. Second, Messerschmidt knew that Bowen had a previous criminal record and was on summary probation for spousal battery and driving without a license.[2] Bowen also had several previous felony convictions and misdemeanor arrests, and was a "third strike candidate" under California law.[3] Third, in addition to identifying the gun Bowen used as a black sawed-off shotgun with a pistol grip, Kelly gave Messerschmidt a picture of Bowen posing with the gun. Fourth, there was no evidence that Bowen's assault on Kelly was in any way gang-related. In subsequent testimony, Messerschmidt answered "No" to the question, "So you didn't have any reason to believe that the assault on Kelly was any sort of a gang crime, did you?"

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[2] Kelly also informed Messerschmidt of Bowen's domestic violence record during their interview.

[3] *See generally Ewing v. California*, 538 U.S. 11, 14-17 (2003).

Before Messerschmidt submitted the warrants and affidavit to the magistrate, they were reviewed by his supervisors in the Sheriff's station, Sergeant Lawrence and Lieutenant Ornales. In addition, Deputy District Attorney Janet Wilson signed the search warrant, indicating that she had reviewed it for probable cause and approved it. Messerschmidt presented the Search Warrant and Affidavit and the Probable Cause Arrest Warrant, along with their attachments (including the affidavit), to a magistrate. The magistrate approved both warrants and authorized night service.

At 5:00 a.m. on the morning of November 6, 2003, the Sheriff's Department's SWAT team served the search and arrest warrants at the 120th St. address. The SWAT team forced open the front security door, broke a front window, and proceeded to enter, search, and clear the house. The ten occupants of the house, including the Millenders, were ordered to exit, which they did. Once the SWAT team had secured the residence, investigators searched the area. While Messerschmidt and Lawrence did not participate in the search, they were both present. The investigators conducting the search failed to find Bowen or a black sawed-off shotgun with a pistol grip. However, they did find and take Augusta Millender's personal shotgun (a black 12-gauge "Mossberg" with a wooden stock), a box of .45 caliber "American Eagle" ammunition, and a letter from Social Services addressed to Bowen. Some two weeks later, Messerschmidt, without SWAT assistance, arrested Bowen in the middle

of the day after discovering Bowen hiding under a bed in a motel room.

The Millenders filed suit under 42 U.S.C. § 1983 against the County of Los Angeles, the Los Angeles County Sheriff's Department, Sheriff Leroy Baca, and 27 Los Angeles County deputies, including Messerschmidt and Lawrence. As relevant here, the Millenders alleged violations of their Fourth and Fourteenth Amendment rights. The parties filed cross motions for summary adjudication on the validity of the arrest and search warrants. The district court concluded that the arrest warrant was facially valid, and granted the defendants' motion for summary adjudication on this issue. The Millenders have not appealed this ruling.

The district court also held that the warrant's authorization to search for and seize all firearms, firearm-related materials, and gang-related items was unconstitutionally overbroad, but that its authorization to search for evidence tending to establish control of the premises was constitutional. Accordingly, the court granted the Millenders' motion for summary adjudication as to firearm- and gang-related evidence, but granted the defendants' motion as to identification evidence. The district court then rejected the deputies' claim of qualified immunity on the ground that the deputies' actions were not objectively reasonable.

Messerschmidt and Lawrence timely appealed the district court's determination that they were not entitled to qualified immunity.

## II

Although we normally lack jurisdiction to consider the denial of a motion for summary judgment, we may consider an appeal from such an interlocutory motion where the motion is based on a claim of qualified immunity, *KRL v. Estate of Moore,* 512 F.3d 1184, 1188 (9th Cir. 2008), even when other claims against the defendants are pending below, *Behrens v. Pelletier,* 516 U.S. 299, 312-13 (1996). "Our jurisdiction . . . , however, is limited to questions of law; it does *not* extend to claims in which the determination of qualified immunity depends upon disputed issues of material fact." *Schwenk v. Hartford,* 204 F.3d 1187, 1195 (9th Cir. 2000). When facts are disputed, "we assume the version of the material facts asserted by the non-moving party to be correct." *Id.*; *see also Groh v. Ramirez,* 540 U.S. 551, 562 (2004). We review the district court's legal determinations de novo. *Elder v. Holloway,* 510 U.S. 510, 516 (1994); *KRL,* 512 F.3d at 1188.

## III

"The doctrine of qualified immunity protects government officials from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which

a reasonable person would have known." *Pearson v. Callahan,* 129 S. Ct. 808, 815 (2009) (internal quotation marks omitted). A police officer is not entitled to qualified immunity if: (1) the facts show that the officer's conduct violated a plaintiff's constitutional rights; and (2) those rights were clearly established at the time of the alleged violation. *See id.* at 816. Although we have discretion to address these prongs in any order, *see id.* at 818, we begin in this case by considering whether the deputies' conduct violated the Millenders' constitutional rights, *see id.* at 816.

A

The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV. The Supreme Court has recognized that a search or seizure pursuant to an invalid warrant constitutes an invasion of the constitutional rights of the subject of that search "at the time of [the] unreasonable governmental intrusion." *United States v. Verdugo-Urquidez,* 494 U.S. 259, 264 (1990); *see also United States v. Leon,* 468 U.S. 897, 906 (1984) ("The wrong condemned by the [Fourth] Amendment is 'fully accomplished' by the unlawful

search or seizure itself. . . ."). Even when only a portion of a search warrant is invalid, the subject of the search suffers a constitutional violation. *See United States v. Sears*, 411 F.3d 1124, 1129 (9th Cir. 2005); *United States v. Spilotro*, 800 F.2d 959, 967-68 (9th Cir. 1986) (Kennedy, J.). A search warrant that is not issued "upon probable cause" is invalid. U.S. Const. amend. IV; *Groh*, 540 U.S. at 557. "Probable cause exists when 'there is a fair probability that contraband or evidence of a crime will be found in a particular place.'" *United States v. Grubbs*, 547 U.S. 90, 95 (2006) (quoting *Illinois v. Gates*, 462 U.S. 213, 238 (1983)). To be valid, a search warrant must also "particularly describ[e]" the "things to be seized." U.S. Const. amend. IV; *see Groh*, 540 U.S. at 557.

We read the Fourth Amendment as requiring "specificity," which has two aspects, "particularity and breadth." *United States v. SDI Future Health, Inc.*, 568 F.3d 684, 702 (9th Cir. 2009). "Particularity is the requirement that the warrant must clearly state what is sought. Breadth deals with the requirement that the scope of the warrant be limited by the probable cause on which the warrant is based." *Id.* (quoting *In re Grand Jury Subpoenas Dated Dec. 10, 1987*, 926 F.2d 847, 856-57 (9th Cir. 1991)). In determining whether a warrant's description is sufficiently specific to meet these Fourth Amendment requirements, we consider the following questions:

> (1) whether probable cause exists to seize all items of a particular type described in the warrant; (2) whether the warrant sets

> out objective standards by which executing officers can differentiate items subject to seizure from those which are not; and (3) whether the government was able to describe the items more particularly in light of the information available to it at the time the warrant was issued.

*Spilotro*, 800 F.2d at 963 (citations omitted). The first consideration encapsulates the overarching Fourth Amendment principle that police must have probable cause to search for and seize "all the items of a particular type described in the warrant." *In re Grand Jury Subpoenas*, 926 F.2d at 857; *see also SDI Future Health*, 568 F.3d at 702-03; *VonderAhe v. Howland*, 508 F.2d 364, 369-70 (9th Cir. 1974). The second and third factors are relevant to determining whether the warrant satisfies this general rule.

When considering challenges to warrants under this framework, we must be mindful that a "magistrate's determination of probable cause should be paid great deference by reviewing courts." *Illinois v. Gates*, 462 U.S. 213, 236 (1983) (internal quotation marks omitted). The Supreme Court has directed us to take a practical approach in determining whether there is sufficient probable cause, and to avoid "interpreting affidavits in a hypertechnical, rather than a common-sense, manner." *Id.* (brackets and internal quotation marks omitted). "Deference to the magistrate, however, is not boundless." *Leon*, 468 U.S. at 914. We are not to "defer to a warrant based on an affidavit that does not provide the magistrate with a

substantial basis for determining the existence of probable cause." *Id.* at 915 (citation and internal quotation marks omitted).

B

We begin by analyzing whether the warrant's authorization to search for firearms and firearm-related materials satisfies the three-factor specificity framework. We first consider whether the deputies had probable cause to search for and seize "all the items of a particular type described in the warrant." *In re Grand Jury Subpoenas,* 926 F.2d at 857. "The premise here is that any intrusion in the way of search or seizure is an evil, so that no intrusion at all is justified without a careful prior determination of necessity." *Coolidge v. New Hampshire,* 403 U.S. 443, 467 (1971) (plurality opinion). For example, probable cause to search for documents pertaining to "certain aspects of [an] operation" cannot justify the seizure of all documents in an office. *United States v. Stubbs,* 873 F.2d 210, 211 (9th Cir. 1989).

As noted above, the warrant in this case authorizes a search for essentially any device that could fire ammunition, any ammunition, and any firearm-related materials. There is no dispute that the deputies had probable cause to search for and seize the "black sawed off shotgun with a pistol grip" used in the crime. But the affidavit does not set forth any evidence indicating that Bowen owned or used other firearms, that such firearms were contraband or

evidence of a crime, or that such firearms were likely to be present at the Millenders' residence. Nothing in the warrant or the affidavit provides any basis for concluding there was probable cause to search for or seize the generic class of firearms and firearm-related materials listed in the search warrant. As such, we conclude that "probable cause did not exist to seize all items of those particular types." *SDI Future Health,* 568 F.3d at 705 (brackets and internal quotation marks omitted).

The rule that police must have probable cause for every item searched does not always invalidate warrants that authorize a search for classes of generic items. *See Spilotro,* 800 F.2d at 963. As the framework's second consideration suggests, a broader search warrant may sometimes be valid if the warrant establishes standards that are sufficiently specific to "reasonably guide the officers in avoiding seizure of protected property" and to allow judicial review "to determine whether the instructions were followed and legitimate property and privacy interests were protected." *United States v. Hillyard,* 677 F.2d 1336, 1340 (9th Cir. 1982); *see also United States v. Gomez-Soto,* 723 F.2d 649, 654 (9th Cir. 1984). Nevertheless, a warrant based on an affidavit describing "a few stolen diamonds" could not validly authorize a search for a broad category of "gemstones and other items of jewelry" because such a warrant would "provide[ ] no basis for distinguishing [the stolen] diamonds from others the government could

expect to find on the premises." *Spilotro,* 800 F.2d at 965.

More specific standards may be contained in an affidavit, rather than the warrant itself, only if: "(1) the warrant expressly incorporate[s] the affidavit by reference and (2) the affidavit either is attached physically to the warrant or at least accompanies the warrant while agents execute the search." *United States v. Kow,* 58 F.3d 423, 429 n.3 (9th Cir. 1995). Applying this principle, we upheld a warrant authorizing police officers to "search all motor vehicles and heavy equipment found on the premises" to determine which were stolen in part because the warrant incorporated an affidavit that established "procedures to differentiate stolen vehicles from those legally owned." *Hillyard,* 677 F.2d at 1339, 1341; *see also United States v. Adjani,* 452 F.3d 1140, 1148-49 (9th Cir. 2006).

In this case, the deputies argue that the affidavit narrowed the scope of the search warrant by including specific information about the crime at issue, the weapon used, and Bowen's gang membership, and that this information cured any constitutional deficiency. The affidavit does satisfy the first prong of the *Kow* test: the district court found that the warrant expressly incorporated the affidavit by reference. But there is no evidence in the record, nor do the deputies argue, that the affidavit was physically attached to the warrant or accompanied the warrant on the search. Therefore, we cannot consider its effect. *See United States v. Bridges,* 344 F.3d 1010, 1018 (9th

Cir. 2003); *see also Groh*, 540 U.S. at 557 ("The Fourth Amendment by its terms requires particularity in the warrant, not in the supporting documents."); *Spilotro*, 800 F.2d at 967; *Hillyard*, 677 F.2d at 1340.

Even if we could consider the affidavit, it still would not cure the warrant's deficiencies. Messerschmidt did not use the affidavit at the Millenders' residence to provide more specific direction to the investigators who searched the house, for instance by alerting the investigators as to what type of firearm (within the generic class of firearms described in the warrant) was used in the crime. Nor did the investigators executing the warrant understand the affidavit to narrow the scope of the search. Rather, they seized Augusta Millender's shotgun, which did not resemble the firearm described by Kelly: it had a wooden stock and was neither sawed-off nor had a pistol grip. As in *Kow*, where we held that an incorporated affidavit did not cure a facially invalid warrant, "there is absolutely no evidence in this case that the officers who executed the warrant, although instructed to read the affidavit, actually relied on the information in the affidavit to limit the warrant's overbreadth." 58 F.3d at 429. Accordingly, we cannot uphold the warrant based on objective standards in the affidavit.

Finally, as suggested by the framework's third consideration, warrants may sometimes authorize a search for classes of generic items if the government was not "able to describe the items more particularly in light of the information available to it at the time

the warrant was issued." *Spilotro,* 800 F.2d at 963; *see also Adjani,* 452 F.3d at 1147-48. For example, in *United States v. Storage Spaces Designated Nos. "8" and "49" Located at 277 East Douglas,* we upheld a warrant authorizing search and seizure of a broad class of potentially misbranded drugs in part because the government did not have information allowing it to describe the drugs more specifically. 777 F.2d 1363, 1370 (9th Cir. 1985). But where the police do have information more specifically describing the evidence or contraband, a warrant authorizing search and seizure of a broader class of items may be invalid. Thus, when "[u]pon the information available to it, the government knew exactly what it needed and wanted," it was unconstitutional for a warrant to authorize "a massive reexamination of all records." *VonderAhe,* 508 F.2d at 370; *see also SDI Future Health,* 568 F.3d at 704-05 (a portion of a search warrant authorizing the search for "Documents relating to non-privileged internal memoranda and E-mail" held invalid when the government's interest was limited to communications related to sleep studies); *Ctr. Art Galleries-Haw., Inc. v. United States,* 875 F.2d 747, 750 (9th Cir. 1989) (where "the government had the means to identify accounts which may have involved [allegedly fraudulent Salvador] Dali artwork," a warrant authorizing agents to seize accounts of other artists was invalid), *superseded by statute on other grounds as stated in J.B. Manning Corp. v. United States,* 86 F.3d 926, 927 (9th Cir. 1996).

In this case, the deputies had a precise description of the firearm used by Bowen in connection with his assault. Kelly, the eyewitness and victim of the assault, described the firearm as a "black sawed off shotgun with a pistol grip" and even provided the deputies with a photo of Bowen posing with the gun. Because the government knew "'exactly what it needed and wanted,'" this third consideration also cuts against the validity of the warrant. *United States v. Cardwell*, 680 F.2d 75, 78 (9th Cir. 1982) (quoting *VonderAhe*, 508 F.2d at 370); *see Spilotro*, 800 F.2d at 963.

The deputies argue that the broad scope of the warrant was necessary in light of the specific circumstances of the crime. They note that a sawed-off shotgun can be broken down into separate pieces for easier concealment and that the deputies had probable cause to believe that a search for the disassembled parts of the sawed-off shotgun would be necessary. But this reasoning does not preclude a more precise description of the items subject to seizure. Under the specific circumstances of the crime, the deputies' probable cause extended only to firearm components that could be part of a disassembled sawed-off shotgun with a pistol grip; there was no probable cause to search for disassembled pieces of all firearms described in the warrant. *See Spilotro*, 800 F.2d at 965.

The deputies also argue that it was necessary to draft the firearm description broadly because Kelly could have been mistaken in her description of the

gun. This argument has little force in this situation, because Kelly provided the officers with a picture of the weapon. The warrant did not omit details that Kelly might have mistaken or that might not have been accurately reflected in the photo, such as the color or specific make of the weapon. Rather, Messerschmidt failed to include any limitation that would have helped focus the warrant on the specific type of gun legitimately subject to the search. Thus, the deputies' argument, if availing, would impermissibly allow police to "enlarge a specific authorization, furnished by a warrant . . . into the equivalent of a general warrant to rummage and seize at will." *Minnesota v. Dickerson,* 508 U.S. 366, 378 (1993) (internal quotation marks omitted).

In short, the deputies had probable cause to search for a single, identified weapon, whether assembled or disassembled. They had no probable cause to search for the broad class of firearms and firearm-related materials described in the warrant. Although we have upheld warrants describing broad classes of items in certain cases, *see Storage Spaces,* 777 F.2d at 1370; *Hillyard,* 677 F.2d at 1340, the rationales adopted in those cases are inapplicable here given the information the deputies possessed.

The deputies raise several additional arguments to justify the breadth of the warrant. These arguments, however, are unrelated to the constitutional requirement that a search warrant not issue except upon probable cause for every item described in the

warrant. *See In re Grand Jury Subpoenas,* 926 F.2d at 857.

First, the deputies argue that it was reasonable for the warrant to authorize a broad search for firearms and firearm-related materials because Bowen is a violent and dangerous person. The deputies draw attention to facts in the affidavit showing that Bowen was suspected of assault with a deadly weapon, was a gang member, and that night service was requested to protect the public. The deputies also rely on research not set forth in the affidavit which indicated that Bowen had a history of violence and several prior felony convictions. The dissent makes similar arguments, *see* Dissent at 12742-44, n.1 & n.6, and also contends that probable cause existed because firearms are inherently dangerous, Dissent at 12743-44.[4]

There is no doubt that deputies have a valid interest in protecting themselves and the public from potentially violent and dangerous suspects. Indeed, the Supreme Court has recognized that courts must give "some latitude" to "officers in the dangerous and difficult process of making arrests and executing search warrants," *Maryland v. Garrison,* 480 U.S. 79, 87 (1987). In this vein, the Court's "search incident to arrest" doctrine allows a police officer to take into account the inherent hazards raised by an arrestee's

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[4] We refer to Judge Callahan's dissent as "the dissent" or "Dissent." We refer to Judge Silverman's dissent by name.

potential access to firearms, *see Chimel v. California*, 395 U.S. 752, 762-63 (1969). But there is no "dangerousness" exception to the Fourth Amendment's probable cause requirement, regardless of whether a search involves violent suspects or deadly weapons. A police officer's valid safety concerns do not create a "fair probability" that a broad class of weapons may be found in a suspect's residence or that such items are contraband or evidence of a crime. *See Grubbs*, 547 U.S. at 95. The deputies cite no case, and we have found none, holding that a warrant's overbreadth could be cured simply because of potential danger to police officers at some point in the future. Indeed, such a rule would permit officers to transform every warrant into a "general, exploratory search[ ]" allowing "indiscriminate rummaging through a person's belongings." *Spilotro*, 800 F.2d at 963; *see also Groh*, 540 U.S. at 561; *Coolidge*, 403 U.S. at 467 (plurality opinion). Nor is there a per se rule that police have probable cause to search the residences of ex-felons for firearms and firearm-related items. *See United States v. Santos*, 403 F.3d 1120, 1132 (10th Cir. 2005) (holding that a prior criminal history, without more, is insufficient to establish reasonable suspicion); *United States v. Herron*, 215 F.3d 812, 814 (8th Cir. 2000) (holding that evidence of prior marijuana convictions is insufficient to create probable cause to search the defendant's residence).[5]

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[5] We do not reach the question whether the deputies could justify the seizure of Augusta Millender's gun under the plain

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Here the record is devoid of evidence that Bowen possessed guns other than the sawed-off shotgun identified by Kelly or that the broad range of firearms covered by the warrant would be present in the Millenders' residence. Therefore, regardless of Bowen's history or the inherent dangerousness of firearms, the police lacked probable cause to apply for a search warrant for a broad range of firearms.[6]

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view doctrine, on the theory that a firearm, if owned by Bowen, could be evidence of a "felon in possession" crime. *See* 18 U.S.C. § 922(g)(1); Cal. Penal Code § 12021(a)(1). This argument was not raised below, and is not a pure question of law. *Cf. Scott v. Ross*, 140 F.3d 1275, 1283 (9th Cir. 1998) (holding that we have discretion to review issues not raised below when "the issue presented is purely one of law" and does not require additional factual development (internal quotation marks omitted)). Rather, in order to raise such an argument, the deputies would need to present evidence on critical factual issues such as whether the deputies saw Augusta Millender's gun "from a place and in circumstances where the viewing officer was entitled to be present," *Spilotro*, 800 F.2d at 968, and whether it would be immediately apparent to them that a firearm was contraband or evidence of a crime when Bowen did not have sole dominion or control over the 120th St. address, *see Horton v. California*, 496 U.S. 128, 136 (1990); *United States v. Ruiz*, 462 F.3d 1082, 1089 (9th Cir. 2006) ("[A]ccess to the premises does not equate to possession.").

[6] The dissent raises the further theory that the deputies had probable cause to obtain the search warrant for the Millenders' residence because they had probable cause to obtain an arrest warrant for Bowen. *See* Dissent at 12743, 12757-58. But these are distinct tests: an arrest warrant must be based on probable cause that "an offense has been or is being committed," *Brinegar v. United States*, 338 U.S. 160, 176 (1949), while a search warrant can issue only on "a fair probability that

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In any event, because Messerschmidt did not inform the magistrate of Bowen's prior felonies, his criminal history is not relevant to our analysis here. It is well established that, in reviewing a search warrant, we are "limited to the information and circumstances contained within the four corners of the underlying affidavit." *Crowe v. County of San Diego,* 593 F.3d 841, 869 (9th Cir. 2010) (internal quotation marks omitted); *see also United States v. Gourde,* 440 F.3d 1065, 1067 (9th Cir. 2006) (en banc). Probable cause is a determination made by the issuing magistrate based on the facts presented to him, not a determination made by an officer based on information known only to himself. *See Gates,* 462 U.S. at 238-39. Therefore, the dissent errs in suggesting that Messerschmidt's personal knowledge that Bowen was a felon is sufficient to create probable cause. Dissent at 12743 & n.1.[7]

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contraband or evidence of a crime will be found in a particular place," *Grubbs,* 547 U.S. at 95 (internal quotation marks omitted). While a suspect's violent propensities may create probable cause for an arrest, there is no per se rule that such propensities authorize a general search for a broad range of weapons.

[7] Nor, contrary to the dissent, could the magistrate properly infer that Bowen had prior felony convictions from the affidavit's reference to information about Bowen in "the cal-gang data base." Dissent at 12743 n.1. According to CALGANG's Advisory Committee, a name may be added to the database based on nothing more than information that a "[s]ubject has been seen frequenting gang areas" and "has been seen affiliating with documented gang members." Cal. Gang Node Advisory Comm., Policy and Procedures for the CALGANG® System 7 (Sept. 27,

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Second, the deputies argue they were justified in seeking all firearms and firearm-related materials because such materials could aid in the prosecution of Bowen. Again, this argument is unrelated to the constitutional requirement that there be probable cause for each item described in the warrant. Although the deputies likely had probable cause to search for a limited range of firearm-related material that would have provided circumstantial evidence of ownership of the sawed-off shotgun at issue, such as receipts or compatible ammunition, the warrant extended beyond such evidence to "[a]ny firearm capable of firing or chambered to fire any caliber ammunition." Put simply, the Fourth Amendment does not authorize the issuance of warrants to conduct fishing expeditions to find evidence that could assist officers in prosecuting suspects. *See Garrison*, 480 U.S. at 84.

The deputies further argue that any caliber of shotgun or receipts would show the possession and purchase of guns. But we fail to see how this gives the deputies probable cause, because the possession and purchase of guns by itself does not constitute contraband or evidence of a crime. *See Gates*, 462 U.S. at

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2007), *available at* http://ag.ca.gov/calgang/pdfs/policy_procedure.pdf. Indeed, the Advisory Committee warns that the CALGANG database "is not designed to provide users with information upon which official actions may be taken," and "cannot be used to provide probable cause for an arrest or be documented in an affidavit for a search warrant." *Id.* at 6.

238. As discussed above, the warrant did not include the information about Bowen's criminal record that could make his possession and purchase of guns a criminal offense, and thus such information cannot be considered in our analysis. *See Crowe,* 593 F.3d at 869. Moreover, while the district court concluded that the deputies had probable cause to search for "[a]rticles of personal property tending to establish the identity of the person or persons in control of the premise or premises," a ruling the Millenders do not challenge on appeal, the deputies do not argue that such probable cause justified their search for the broad range of firearms listed in the warrant. Nor could they. While we have upheld warrants authorizing searches for "[i]ndicia tending to establish the identity of persons in control of the premises," *Ewing v. City of Stockton,* 588 F.3d 1218, 1229 (9th Cir. 2009), the probable cause to search for such "indicia of control" usually refers to such items as "utility company receipts, rent receipts, cancelled mail envelopes, and keys," *United States v. Honore,* 450 F.2d 31, 33 (9th Cir. 1971), not to the full range of firearm and firearm-related materials sought here. *See United States v. Whitten,* 706 F.2d 1000, 1009 (9th Cir. 1983) (upholding a warrant authorizing the seizure of a broad range of documents only to the extent the documents indicated "the ownership or occupancy" of a residence, and noting that without such a limitation the warrant's broad authorization "might have been unreasonable"), *abrogated on other grounds by United States v. Perez,* 116 F.3d 840, 844-46 (9th Cir. 1997) (en banc); *cf. United States v.*

*Rettig*, 589 F.2d 418, 420-21, 423 (9th Cir. 1978) (invalidating a warrant allowing a search for indicia of the identity of the residents of a house when government agents used it as a pretext to search for evidence of a cocaine smuggling conspiracy).

Although we are deferential to a magistrate's determination of probable cause and consider the language of a warrant and affidavit in a common sense and practical manner, *Gates*, 462 U.S. at 236 here we are unable to identify any basis, let alone a "substantial basis," *see Leon*, 468 U.S. at 915, for probable cause to search and seize the broad category of firearm and firearm-related materials set forth in the warrant. Accordingly, we find ourselves in that rare situation where we must conclude that the magistrate lacked a substantial basis for issuing the warrant for this broad range of items.

C

We next consider the search warrant's authorization to search for all gang-related items. The affidavit contains two references to Bowen's alleged gang membership. It states that Bowen is "a known Mona Park Crip gang member," and it asserts, in the section justifying a request for night service, that Bowen "has gang ties to the Mona Park Crip gang based on information provided by the victim and the cal-gang data base." Neither of these assertions provides probable cause for a magistrate to conclude that "contraband or evidence of a crime," *Gates*, 462 U.S.

at 238, would be found at Mrs. Millender's residence. Merely being a gang member or having gang ties is not a crime in California. *People v. Gardeley*, 927 P.2d 713, 725 (Cal. 1996). The relevant California law "imposes increased criminal penalties" for gang membership only when the underlying criminal act is "'for the benefit of, at the direction of, or in association with' a group that meets the specific statutory conditions of a 'criminal street gang,'" and when the act is done with the "'specific intent to promote, further, or assist in any criminal conduct by gang members.'" *Id.* (quoting Cal. Penal Code § 186.22(b)(1)). Here, Messerschmidt himself stated he had no reason to believe that Bowen's assault on Kelly was related to gangs, and there is no evidence in the affidavit (or the record) to suggest otherwise. Because the deputies failed to establish any link between gang-related materials and a crime, the warrant authorizing the search and seizure of all gang-related evidence is likewise invalid.

## IV

Our conclusion that there was no probable cause for the broad categories of firearm- and gang-related items listed in the search warrant, and that the search warrant violated the Millenders' constitutional rights, is only the first step in our analysis of whether the deputies are entitled to qualified immunity. We must next consider whether the Millenders' constitutional rights were "clearly established" at the time of

the deputies' alleged misconduct. *Pearson,* 129 S. Ct. at 816.

A

The Supreme Court has refined the application of the qualified immunity test in the Fourth Amendment context. *See Malley,* 475 U.S. at 344-46; *Groh,* 540 U.S. at 563-65. In private actions against officers who have executed constitutionally inadequate warrants, the Supreme Court has held that an officer loses qualified immunity only when "a reasonably well-trained officer in [the defendant officer's] position would have known that his affidavit failed to establish probable cause and that he should not have applied for the warrant." *Malley,* 475 U.S. at 345. This standard "provides ample protection to all but the plainly incompetent or those who knowingly violate the law." *Id.* at 341.

Despite this protection, the Supreme Court has preserved the right of individuals to seek relief in certain narrowly defined circumstances. *Malley* and *Groh,* the two leading Supreme Court cases in this context, deal with facts and arguments similar to the case before us. In *Malley,* plaintiffs sued a state trooper under § 1983 for applying for an arrest warrant that failed to establish probable cause. *Id.* at 337.[8] Rather than granting the officer absolute im-

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[8] Though *Malley* dealt with an arrest warrant, the opinion applies to both arrest and search warrants. *See* 475 U.S. at 344;

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munity, *Malley* held that officers should receive only qualified immunity because "it would be incongruous to test police behavior by the 'objective reasonableness' standard in a suppression hearing, *United States v. Leon,* 468 U.S. 897 (1984), while exempting police conduct in applying for an arrest or search warrant from any scrutiny whatsoever in a § 1983 damages action." *Malley,* 475 U.S. at 344. Accordingly, *Malley* held that officers would be entitled to qualified immunity in § 1983 actions only under the same facts that would allow the government to claim a good faith exception to the exclusionary rule in a suppression hearing. Said otherwise, officers lose immunity only "where the warrant application is so lacking in indicia of probable cause as to render official belief in its existence unreasonable." *Id.* at 344-45 (citing *Leon,* 468 U.S. at 923).

*Malley* rejected the argument that the trooper was "shielded from damages liability because the act of applying for a warrant is *per se* objectively reasonable" and that he was "entitled to rely on the judgment of a judicial officer in finding that probable cause exists and hence issuing the warrant." *Id.* at 345. According to *Malley,* that view of objective reasonableness was "at odds" with cases such as *Leon* and *Harlow v. Fitzgerald,* 457 U.S. 800 (1982). *Malley,* 475 U.S. at 345. Rather, the pertinent

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*Marks v. Clarke,* 102 F.3d 1012, 1026 & n.31 (9th Cir. 1997) (applying *Malley* to search warrants).

question must be "whether a reasonably well-trained officer in [the defendant officer's] position would have known that his affidavit failed to establish probable cause and that he should not have applied for the warrant." *Id.* If a reasonable officer would have known that the affidavit was fatally deficient, then the defendant's "application for a warrant was not objectively reasonable, because it created the unnecessary danger of an unlawful arrest [or search]." *Id.* *Malley* declined to hold that an officer could rely on the determination of the magistrate, stating that "it is possible that a magistrate, working under docket pressures, will fail to perform as a magistrate should" and, accordingly, it was "reasonable to require the officer applying for the warrant to minimize this danger by exercising reasonable professional judgment." *Id.* at 345-46.

*Groh* offers an example of one of the rare cases described in *Malley* when a warrant is "so lacking in indicia of probable cause as to render official belief in its existence unreasonable," 475 U.S. at 345, notwithstanding the approval of a magistrate. In *Groh*, the plaintiff claimed his Fourth Amendment rights had been violated because the warrant authorizing the search and seizure of his property was invalid. 540 U.S. at 554-55. Although the defendant officer had prepared a detailed application for the warrant, the warrant itself included only a description of the plaintiff's residence, and it did not incorporate the application by reference. *Id.* *Groh* held that the warrant "was plainly invalid" because it totally failed

to describe the things to be seized, let alone with particularity. *Id.* at 557. Accordingly, the Court concluded that the search conducted pursuant to the warrant was unconstitutional. *Id.* at 563. Rejecting the officer's assertion of qualified immunity, *Groh* reasoned that "just a simple glance[ ] would have revealed a glaring deficiency that any reasonable police officer would have known was constitutionally fatal." *Id.* at 564. Further, the Court held that the officer "may not argue that he reasonably relied on the Magistrate's assurance that the warrant contained an adequate description of the things to be seized and was therefore valid" because the officer himself prepared the invalid warrant. *Id.*

Accordingly, as *Malley* and *Groh* make clear, a plaintiff can proceed with a § 1983 action stemming from an officer's application for an invalid warrant in those limited situations when "a reasonably well-trained officer" in the defendant's situation would have known that the warrant did not establish probable cause. *Malley,* 475 U.S. at 345; *see Groh,* 540 U.S. at 564. When the warrant is so lacking in indicia of probable cause, officers cannot claim that they acted reasonably by seeking a warrant merely because a neutral magistrate approved the application; rather, officers must exercise their own "reasonable professional judgment." *Malley,* 475 U.S. at 346.

In interpreting these precedents, we have emphasized the "distinction between warrants with disputable probable cause and warrants so lacking in probable cause that no reasonable officer would view

them as valid." *KRL*, 512 F.3d at 1190; *see also United States v. Shi*, 525 F.3d 709, 731 (9th Cir.) ("Good faith reliance exists if the agents' affidavit establishes 'at least a colorable argument' for probable cause, and the agents relied on the search warrant in an objectively reasonable manner." (quoting *United States v. Luong*, 470 F.3d 898, 903 (9th Cir. 2006))), *cert. denied*, 129 S. Ct. 324 (2008). Where the "lack of probable cause was so obvious that any reasonable officer reading the warrant would conclude that the warrant was facially invalid," we have held that "[a]pproval by an attorney and a magistrate did not justify reasonable reliance." *KRL*, 512 F.3d at 1192 (citing *Kow*, 58 F.3d at 428-29).

B

While the deputies claim that "a reasonably well-trained officer" in their position would not have known that the search warrant failed to establish probable cause, *Malley*, 475 U.S. at 345, they add little to their prior arguments. The deputies argue that they could have reasonably but mistakenly concluded that they had probable cause to seize the weapon found at the Millender residence because "they would not know if the suspect would be coming back and the officers would not want the suspect to gain access to more weapons and hurt other people, including the victim in this case." To the extent this argument differs from their "dangerousness" argument, *see supra* at pp. 12729-30, it also fails. Although officers may make a warrantless entry into a

residence under certain exigent circumstances, such as when "they have an objectively reasonable basis for believing that an occupant is seriously injured or imminently threatened with such injury," *see Brigham City v. Stuart*, 547 U.S. 398, 400 (2006), the exigent circumstances doctrine is an exception to the warrant requirement, *id.* at 403, not an authorization for the deputies to apply for a warrant that is not supported by probable cause. The deputies also assert they could have been reasonably mistaken as to whether the underlying crime was gang-related. This argument borders on the frivolous, given Messerschmidt's statement that he had no reason to hold such a belief, and the absence of any evidence that the crime at issue was gang-related.

The deputies' arguments cannot change the reality that the warrant in this case suffered a "glaring deficiency." *Groh*, 540 U.S. at 564. Neither it nor the affidavit established probable cause that the broad categories of firearms, firearm-related material, and gang-related material described in the warrant were contraband or evidence of a crime. Moreover, a reasonable officer in the deputies' position would have been well aware of this deficiency. The affidavit indicated exactly what item was evidence of a crime, the black sawed-off shotgun with a pistol grip, and reasonable officers would know they could not undertake a general, exploratory search for unrelated items unless they had additional probable cause for those items. *See SDI Future Health*, 568 F.3d at 702-03; *In re Grand Jury Subpoenas*, 926 F.2d at 857;

*VonderAhe,* 508 F.2d at 369-70. Under these circumstances, we cannot say that an officer could reasonably but mistakenly believe that the search warrant established "a colorable argument for probable cause." *See Shi,* 525 F.3d at 731. Rather, the warrant here was "plainly invalid." *Groh,* 540 U.S. at 557.

Citing the dissenting opinions in *Malley* and *Groh, see* Dissent at 12748 n.8, 12748-50 & n.10, 12760, the dissent would hold that the officers acted in an objectively reasonable manner as a matter of law because they "reasonably relied" on the review and approval of "their superiors, the district attorney, and the magistrate to correct the alleged over breadth in the search warrant," Dissent at 12757. Judge Silverman likewise suggests that the deputies are entitled to qualified immunity because they obtained a warrant, consulted with their superiors, and acted in good faith. Silverman Dissent at 12767. We cannot accept these propositions, however, because they conflict with the majority opinions in *Malley* and *Groh,* which imposed on police officers the independent responsibility to ensure there is at least a colorable argument for probable cause, and rejected the factors suggested by the dissenting justices for giving police officers even further protection from liability. *See Groh,* 540 U.S. at 563-64; *Malley,* 475 U.S. at 345-46. Nor can we agree that the officers were objectively reasonable in obtaining a search warrant for a broad range of firearms and gang indicia because the suspect was an ex-felon, the firearms were inherently dangerous, and the firearms were specifically

described. Dissent at 12759-60. As explained above, under basic Fourth Amendment principles, a search warrant is not supported by probable cause unless the affidavit establishes that the items in the search warrant are contraband or evidence of a crime; neither information known only to the officer, the criminal status of the suspect, nor the dangerousness of the items listed in the warrant establishes probable cause. The dissent's desire to transform these long-standing rules into a more "workable guideline," Dissent at 12752, does not excuse the police officers from compliance with the existing rules mandated by the Supreme Court.[9]

The deputies here had a responsibility to exercise their reasonable professional judgment. *See Malley*, 475 U.S. at 346. As *Malley* recognized, "ours is not an

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[9] The dissent also suggests that the officers' reliance on the search warrant was objectively reasonable because only two sections of the warrant lacked probable cause, and those sections "do not appear to have been very important either when the warrant was initially sought or later." Dissent at 12763; *see* Dissent at 12758-59. In fact, those two sections of the warrant set forth the entire description of the items to be seized, and the district court invalidated all but a single sentence. *Supra* at p. 12720. Although we have held that the invalid portions of a search warrant may be severed from the valid portions, "severance is not available when the valid portion of the warrant is 'a relatively insignificant part' of an otherwise invalid search." *In re Grand Jury Subpoenas*, 926 F.2d at 858 (quoting *Spilotro*, 800 F.2d at 967). Here, even though the district court upheld a single sentence and even though the description of the items to be searched for and seized comprised only two paragraphs, the officers' reliance on the warrant as a whole was not reasonable.

ideal system," and as such in circumstances such as these a neutral magistrate's approval (and, a fortiori, a non-neutral prosecutor's, *see Coolidge,* 403 U.S. at 449-50) cannot absolve an officer of liability. *Malley,* 475 U.S. at 345.[10] Accordingly, the deputies are not entitled to qualified immunity with respect to the Millenders' claim that their role in obtaining and executing the warrants violated their constitutional rights.

V

"While the purposes justifying a police search strictly limit the permissible extent of the search, the Court has also recognized the need to allow some latitude for honest mistakes that are made by officers in the dangerous and difficult process of making arrests and executing search warrants." *Garrison,* 480 U.S. at 87. In the majority of cases, officers who reach a reasonable but mistaken conclusion that a warrant was justified by probable cause will be shielded from suit by qualified immunity. *See Malley,* 475 U.S. at 341. "But the mistakes must be those of

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[10] Nor is this a case where the warrant was defective because the magistrate made an error, as in *Massachusetts v. Sheppard,* 468 U.S. 981, 989-90 (1984), in which the Court declined to suppress evidence obtained with an improper warrant form where the authorizing magistrate assured the detective that he would make the changes necessary to ensure its validity. Here, Messerschmidt prepared the overbroad warrant himself, and the magistrate gave no assurances that he would fix errors in the warrant.

reasonable men, acting on facts leading sensibly to their conclusions of probability." *Brinegar*, 338 U.S. at 176. Where, as here, the warrant was so facially invalid that no reasonable officer could have relied on it, the deputies are not entitled to qualified immunity, and the Millenders can proceed with their § 1983 claim.

**AFFIRMED.**

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CALLAHAN, Circuit Judge, with whom TALLMAN, Circuit Judge joins, dissenting:

Although the majority's opinion nicely lays out the law applicable to a determination of qualified immunity, my review of the law and the facts in this case require that I dissent. I address four matters. First, I take issue with the majority's determination that the warrant constitutionally could not provide for the search and seizure of firearms other than the sawed-off shotgun. Second, in reviewing the applicable case law, the majority fails to appreciate the factors courts have used to transform an abstract standard – did the officer reasonably rely on review by counsel and a magistrate – into a workable guide for a line officer. Third, I would find that the totality of the circumstances in this case compels a finding that the line officer reasonably relied on his supervisors, the district attorney, and the magistrate to determine the constitutional limits of the search warrant. Finally, I am concerned that the majority's parsing of the search warrant is likely to encourage

uncertainty and needless litigation. I would grant the officer qualified immunity.

## I

Our differing views on the warrant's provision for the search and seizure of firearms are revealed by our respective applications of *United States v. Spilotro*, 800 F.2d 959 (9th Cir. 1986), which sets forth the framework for determining a warrant's sufficiency. There we held that "[i]n determining whether a description is sufficiently precise," we should concentrate on one or more of the following:

> (1) whether probable cause exists to seize all items of a particular type described in the warrant; (2) whether the warrant sets out objective standards by which executing officers can differentiate items subject to seizure from those which are not; and (3) whether the government was able to describe the items more particularly in light of the information available to it at the time the warrant was issued.

*Id.* at 963 (citations omitted).

The majority admits that there was probable cause to search for and seize the "black sawed-off shotgun with a pistol grip," but objects that "the affidavit does not set forth any evidence indicating that Bowen owned or used any other firearms, that such firearms were contraband or evidence of a crime, or that such firearms were likely to be present at the

Millenders' residence." Op. at 12724. This approach overlooks the fact that the search warrant was accompanied by an arrest warrant for Bowen, the real object of the search, who the officer believed resided at the residence. Bowen was reasonably considered to be dangerous. He had fired a shotgun in public at Kelly, was a member of a street gang, and had a criminal record including prior felonies.[1] Because of Bowen's dangerousness, the deputies requested nighttime service of the warrant. The magistrate approved nighttime service, and the district court held that the facts specified in the affidavit were sufficient to justify nighttime service. The district court also concluded that the arrest warrant was facially valid and that its authorization to search for evidence tending to establish who controlled the premises was constitutional. Op. at 12720.

Given this context, the officers had probable cause to search for and seize any firearms in the home in which Bowen, a gang member and felon, was thought to reside. In *Illinois v. Gates*, 462 U.S. 213,

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[1] Although the affidavit in support of the search warrant did not explicitly state that Bowen had a criminal record, this can be inferred from its statement that his membership in the Mona Park Crip gang was based, in part, on information in "the cal-gang data base." This database is a California-funded, law enforcement-maintained, database of criminal street gangs and their members including criminal histories and activities. *See* http://ag.ca.gov/calgang. Further, the majority notes first that the officer knew that Bowen had several previous felony convictions and second that Bowen was a "third strike candidate" under California law. Op. at 12719.

238 (1983), the Supreme Court held that probable cause exists when "there is a fair probability that contraband or evidence of a crime will be found in a particular place."[2] *See also United States v. Grubbs*, 547 U.S. 90, 95 (2006). Firearms by their very nature are dangerous and numerous laws render their possession by convicted felons criminal. *See, e.g.*, 18 U.S.C. § 922(g). Thus, in light of the facts known to the officer, i.e., that Bowen had recently fired a shotgun at his girl friend, was a gang member, was a felon, and presumably was armed, there was at least a "fair probability" not only that there might be firearms in the house in which Bowen was believed to be residing, but that such firearms would be "contraband or evidence of a crime."[3] Moreover, the safety of

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[2] The Supreme Court explained:

> we reaffirm the totality-of-the-circumstances analysis that traditionally has informed probable cause determinations. . . . The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of a reviewing court is simply to ensure that the magistrate had a "substantial basis for . . . conclud[ing]" that probable cause existed.

547 U.S. at 95.

[3] This is not a *per se* rule as suggested by the majority. *See* op at 12729. Rather, the specific factors set forth above meet the requirement of probable cause set forth in *Gates*, 462 U.S. at 238.

all involved, both the officers and the inhabitants of the home, requires that officers seeking the nighttime arrest of a dangerous felon be allowed to seize any firearm that they come across in their search for that individual or for evidence that is otherwise properly covered by the search warrant.[4] Indeed, securing any weapons found during the search is justified to protect the officers executing the warrant from harm while doing so.

Once it is understood that there was a fair probability that any firearms found in the house in which Bowen was thought to reside would be contraband or evidence of a crime,[5] the warrant meets the second and third provisions of the *Spilotro* framework. The

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[4] The majority notes that a sawed-off shotgun can be broken down into separate pieces for easy concealment, but insists that the "deputies' probable cause extended only to the disassembled pieces of the sawed-off shotgun with a pistol grip." Op. at 12727-28. It also declines to "reach the question whether the deputies could justify the seizure of Mrs. Millender's gun under the plain view doctrine," because the issue was not raised below and is not a pure question of law. Op. at 12730 n. 4. However, once the permissible scope of the search is defined as a search for disassembled parts of the sawed-off shotgun, then an officer is entitled to search anywhere that any firearm might be hidden. In other words, allowing for the search for other weapons does not expand the areas that the police may search beyond those that might also contain part of a disassembled shotgun.

[5] Indeed, if the shotgun the officers seized had been registered to Bowen, or if it were unregistered and under Bowen's control, it most likely would have been contraband or evidence of a crime.

warrant sets out firearms and firearms-related items in objective language that allowed the officers to differentiate what items they might seize.[6] Furthermore, as any firearm was likely to be contraband or evidence of a crime, a more particular description was neither required nor desirable. Accordingly, I dissent from the majority's determination that the warrant's

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[6] The majority objects that the "affidavit does not set forth any evidence indicating that Bowen owned or used any other firearms, that such firearms were contraband or evidence of a crime, or that such firearms were likely to be present at the Millenders' residence." Op. at 12724. The majority further comments that "nothing in the warrant or the affidavit provides any basis for concluding that there was probable cause to search for or seize the generic class of firearms." Op. at 12724. This perspective fails to appreciate that Bowen was a felon, demonstrably dangerous, and a gang member who was wanted for shooting at his ex-girl friend in public. These facts alone are sufficient to justify the search for firearms during a nighttime search (or at least a reasonable officer could think so). The cases cited by the majority, *Grubbs*, 547 U.S. at 95, and *In re Grand Jury Subpoenas Dated Dec. 10, 1987*, 926 F.2d 847, 857 (9th Cir. 1991), are not to the contrary. In *Grubbs*, the Supreme Court addressed the anticipatory nature of warrants and commented that "where the police seek permission to search a house for an item they believe is already located there, the magistrate's determination that there is probable cause for the search amounts to a prediction that the item will still be there when the warrant is executed." 547 U.S. at 95. The cited section of *In re Grand Jury Subpoenas*, 926 F.2d at 857, concerned the particularity and breadth of the warrant. Neither case dealt with items such as firearms which are inherently dangerous and may not be possessed by certain felons. Here, the officers had a reasonable suspicion that Bowen would have firearms and that the firearms would be contraband, if not evidence of crimes.

provision for the search and seizure of firearms was unconstitutional.[7]

## II

### A. Supreme Court Authority

The majority and I agree that the standard for determining qualified immunity has been set forth by the Supreme Court in *Malley v. Briggs*, 475 U.S. 335, 345-46 (1986) and *Groh v. Ramirez*, 540 U.S. 551 (2004). Moreover, there is little difference in our reading of these opinions in the abstract. Rather, we differ on the application of the qualified immunity test to a front line police officer's request for an arrest warrant and accompanying search warrant. The majority's position is difficult to reconcile with the Fourth Amendment's preference for searches authorized by neutral and detached magistrates.

In *Malley*, the Supreme Court considered a claim that a police officer caused the plaintiffs to be unconstitutionally arrested by presenting a judge with an affidavit which failed to establish probable cause. 475 U.S. at 337. The Court first rejected an argument

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[7] The relationship between gang-related indicia and the offense for which Bowen was sought is admittedly more attenuated. Accordingly, I do not disagree with the majority's determination that this provision of the warrant was overbroad. However, as explained later in this dissent, when viewed in context, the line officers' inclusion of the provision in the warrant was reasonable.

that the police officer was entitled to absolute immunity. *Id.* at 340-41. After explaining the basis for adopting an "objective reasonableness" standard, the Court commented:

> We also reject petitioner's argument that if an officer is entitled to only qualified immunity in cases like this, he is nevertheless shielded from damages liability because the act of applying for a warrant is *per se* objectively reasonable, provided that the officer believes that the facts alleged in his affidavit are true. Petitioner insists that he is entitled to rely on the judgment of a judicial officer in finding that probable cause exists and hence issuing the warrant. This view of objective reasonableness is at odds with our development of that concept in *Harlow* and *Leon*. In *Leon,* we stated that "our good-faith inquiry is confined to the objectively ascertainable question whether a reasonably well-trained officer would have known that the search was illegal despite the magistrate's authorization." 468 U.S. at 922 n.23. . . The analogous question in this case is whether a reasonably well-trained officer in petitioner's position would have known that his affidavit failed to establish probable cause and that he should not have applied for the warrant. If such was the case, the officer's application for a warrant was not objectively reasonable, because it created the unnecessary danger of an unlawful arrest. It is true that in an ideal system an unreasonable request for a warrant would be harmless,

> because no judge would approve it. But ours is not an ideal system, and it is possible that a magistrate, working under docket pressures, will fail to perform as a magistrate should. We find it reasonable to require the officer applying for the warrant to minimize this danger by exercising reasonable professional judgment.

*Id.* at 345-46 (footnotes omitted). The Court offered additional guidance in the following footnote:

> Notwithstanding petitioner's protestations, the rule we adopt in no way "requires the police officer to assume a role even more skilled . . . than the magistrate." . . . It is a sound presumption that "the magistrate is more qualified than the police officer to make a probable cause determination," *ibid.*, and it goes without saying that where a magistrate acts mistakenly in issuing a warrant but within the range of professional competence of a magistrate, the officer who requested the warrant cannot be held liable. But it is different if no officer of reasonable competence would have requested the warrant, *i.e.*, his request is outside the range of the professional competence expected of an officer. If the magistrate issues the warrant in such a case, his action is not just a reasonable mistake, but an unacceptable error indicating gross incompetence or neglect of duty. The officer then cannot excuse his own default

> by pointing to the greater incompetence of the magistrate.

*Id.* at 346 n.9.[8]

The second Supreme Court case relied on by the majority, *Groh,* provides guidance on the application of the *Malley* standard. In *Groh,* the warrant completely failed to identify the items to be searched.[9] 540 U.S. at 554. The Supreme Court held that the warrant was "plainly invalid," *id.* at 557, and that "even a cursory reading of the warrant in this case –

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[8] Justice Powell was right when joined by then-Justice Rehnquist, he issued a concurring and dissenting opinion criticizing the majority for giving "little evidentiary weight to the finding of probable cause by a magistrate or judicial officer." *Id.* at 350. Justice Powell urged:

> The police, where they have reason to believe probable cause exists, should be encouraged to submit affidavits to judicial officers. I therefore believe that in a suit such as this, the Court should expressly hold that the decision by the magistrate is entitled to substantial evidentiary weight. A more restrictive standard will discourage police officers from seeking warrants out of fear of litigation and possible personal liability. The specter of personal liability for a mistake in judgment may cause a prudent police officer to close his eyes to facts that should at least be brought to the attention of the judicial officer authorized to make the decision whether a warrant should issue.

*Id.* at 353-54 (footnote omitted).

[9] The Court noted that "[i]n the portion of the form that called for a description of the 'person or property' to be seized, petitioner typed a description of respondents' two-story blue house rather than the alleged stockpile of firearms." 540 U.S. at 554.

perhaps just a simple glance – would have revealed a glaring deficiency that any reasonable police officer would have known was constitutionally fatal." *Id.* at 564. Accordingly, the Court declined to allow petitioner to invoke the magistrate's approval of the warrant as shielding him from liability for preparing an invalid warrant that was contrary to his department's own guidelines. *See* 540 U.S. at 564.

Despite the fact that the warrant was facially invalid, four Justices dissented. In his dissent, Justice Kennedy, joined by Chief Justice Rehnquist, stated that the central question is whether "someone in the officer's position could reasonably but mistakenly conclude that his conduct complied with the Fourth Amendment." 540 U.S. at 566. He commented that an officer "may be unaware of existing law and how it should be applied," "may misunderstand important facts about the search and assess the legality of his conduct based on that misunderstanding," or "may misunderstand elements of both the facts and the law." *Id.* at 566-67. Justice Kennedy asserted that the "qualified immunity doctrine applies regardless of whether the officer's error is a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact." *Id.* at 567.

Justice Kennedy went on to assert that language in *United States v. Leon,* 468 U.S. 897 (1984), was not applicable to the situation before the Court because the respondents "do not make the usual claim that they were injured by a defect that led to an improper search" but "were injured simply because the warrant

form did not contain the correct description of the property to be seized even though no property was seized." *Id.* at 570-71. He concluded that the Court "has stressed 'the purpose of encouraging recourse to the warrant procedure' can be served best by rejecting overly technical standards when courts review warrants." *Id.* at 571 (quoting *Gates*, 462 U.S. at 237).

Justice Thomas filed a separate dissenting opinion, joined by Chief Justice Rehnquist and Justice Scalia, which in addition to questioning whether the underlying search was unconstitutional, held that the officer was entitled to qualified immunity. He objected that the Court had used an inappropriate "high level of generality" to establish a clear violation of the Constitution.[10] Instead, he opined that the focus

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[10] Justice Thomas explained:

> The qualified immunity inquiry rests on "the 'objective legal reasonableness' of the action, *Harlow* [*v. Fitzgerald*, 457 U.S. 800, 819 . . . (1982)], assessed in light of the legal rules that were 'clearly established' at the time it was taken." *Anderson v. Creighton*, 483 U.S. at 639 . . . The outcome of this inquiry "depends substantially upon the level of generality at which the relevant 'legal rule' is . . . identified. For example, the right to due process of law is quite clearly established by the Due Process Clause, and thus there is a sense in which any action that violates that Clause . . . violates a clearly established right." *Ibid.* To apply the standard at such a high level of generality would allow plaintiffs "to convert the rule of qualified immunity . . . into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights." *Ibid.* The Court in *Anderson* criticized the

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should be on "'the objective (albeit fact-specific) question whether a reasonable officer could have believed Anderson's warrantless search to be lawful, in light of clearly established law and the information the searching officer possessed.'" *Id.* at 578 (quoting *Anderson,* 583 U.S. at 641).

A third Supreme Court decision, *Leon,* 468 U.S. 897, is also instructive. In *Leon,* the Supreme Court adopted a good-faith exception for the exclusionary rule where evidence had been obtained as a result of a warrant that was subsequently determined to lack probable cause. In doing so, the Court stressed that the "detached scrutiny of a neutral magistrate . . . is a more reliable safeguard against improper searches than the hurried judgment of a law enforcement officer." *Id.* at 913-14. The Court noted that "[r]easonable minds frequently may differ on the question whether a particular affidavit establishes probable cause, and we have thus concluded that the preference for warrants is most appropriately effectuated by according 'great deference' to a magistrate's determination." *Id.* at 914 (internal citation omitted). The Court, however, noted that deference was not

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Court of Appeals for considering the qualified immunity question only in terms of the petitioner's "right to be free from warrantless searches of one's home unless the searching officers have probable cause and there are exigent circumstances." *Id.* at 640.

540 U.S. at 578.

boundless, and did not preclude inquiry into (1) "the knowing or reckless falsity of the affidavit [supporting the warrant]," (2) whether the magistrate "merely served as a rubber stamp for the police," and (3) whether the affidavit provided the magistrate "with a substantial basis for determining the existence of probable cause." *Id.* at 914-15 (quoting *Gates*, 462 U.S. at 239). Thus, a reviewing court "may properly conclude that, notwithstanding the deference that magistrates deserve, the warrant was invalid because the magistrate's probable-cause determination reflected an improper analysis of the totality of the circumstances, . . . or because the form of the warrant was improper in some respect." *Id.* at 915 (internal citation omitted).

Nonetheless, the Court noted that "where the officer's conduct is objectively reasonable, excluding the evidence will not further the ends of the exclusionary rule in any appreciable way: for it is painfully apparent that . . . the officer is acting as a reasonable officer would and should act in similar circumstances." *Id.* at 919-20 (internal quotation marks and citation omitted). The Court commented that "[i]t is the magistrate's responsibility to determine whether the officer's allegations establish probable cause," and "[i]n the ordinary case, an officer cannot be expected to question the magistrate's probable-cause determination or his judgment that the form of the warrant is technically sufficient." *Id.* at 920. The Court concluded that "[p]enalizing the officer for the magistrate's error, rather than his own, cannot logically

contribute to the deterrence of Fourth Amendment violations." *Id.*

Finally, the Court explained that the officer's reliance on the magistrate's probable-cause determination must be objectively reasonable. *Id.* at 922. The "good faith inquiry is confined to the objectively ascertainable question whether a reasonably well-trained officer would have known that the search was illegal despite the magistrate's authorization." *Id.* at 920 n.23. The Court then indicates that suppression would be appropriate where (1) the magistrate "was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard for the truth;" (2) "the issuing magistrate wholly abandoned his judicial role;" (3) where the affidavit was "so lacking in indicia of probable cause to render official belief in its existence entirely unreasonable" (quoting *Brown v. Illinois,* 422 U.S. 590, 610-11 (1975)); or (4) the warrant was facially deficient "in failing to particularize the place to be searched or the things to be seized." *Id.* at 923.

Although the case at bar concerns qualified immunity and not the suppression of evidence, the Court's discussion in *Leon* of the role of the magistrate and deference to the magistrate informs – as the majority recognizes – our analysis of the officer's conduct in our case.

In sum, I agree with the majority that pursuant to *Malley* and *Groh*, the question is whether a reasonably well-trained officer in the defendant's situation would have known that the warrant did not establish probable cause. Op. at 12734-35. But an appreciation of the specific language in the Supreme Court's opinions should lead us to focus on those factors that transform an abstract standard into a workable guideline for a line officer.

**B. Ninth Circuit Authority**

A review of our own precedent reveals and reinforces the factors that should be considered in determining whether an officer who sought a warrant reasonably relied on review by counsel and a magistrate. In *KRL v. Estate of Moore*, 512 F.3d 1184 (9th Cir. 2008) ("*KRL II*"), we reiterated the Supreme Court's perspective that qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." *Id.* at 1189 (quoting *Malley*, 475 U.S. at 341). We noted that courts "treat magistrates as more qualified than police officers to make determinations of probable cause," and that as a general matter an officer cannot be expected to question a magistrate's probable cause determination. *Id.* (citing *Leon*, 468 U.S. at 921). We stated that "[o]fficers lose their shield of qualified immunity 'only where the warrant application is so lacking in indicia of probable cause as to render official belief in its existence unreasonable.'" *Id.* at 1189-90 (quoting *Malley*, 475 U.S. at 344-45).

We then cited *Ortiz v. Van Auken,* 887 F.2d 1366 (9th Cir. 1989), as an example of where it was reasonable for an officer to rely on an invalid search warrant that "was not so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." *KRL II,* 512 F.3d at 1190. In *Ortiz,* the officers, relying on four anonymous telephone calls apparently from the same individual, sought a warrant to search a residence in which the anonymous informant alleged that explosives were stored. 887 F.2d at 1367-68. The officers prepared a warrant and took it first to a deputy district attorney and then to a judge, both of whom approved the warrant. *Id.* We held that the officers were entitled to qualified immunity in part because review by the deputy district attorney and the judge weighed in favor of finding that the officers' belief was not entirely unreasonable. *Id.* at 1370. We further noted that the warrant was not facially overbroad.[11]

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[11] We explained:

> Ortiz complains that the warrant lacked probable cause – the very situation confronted by the Supreme Court in *Leon*. . . . 468 U.S. at 921. . . . In explaining the parameters of the good faith exception, *Leon* distinguished between warrants that are facially invalid for lack of particularity and those so lacking in indicia of probable cause as to render an officer's belief in its existence "entirely unreasonable." *Id.* at 923. Determining whether certain facts constitute probable cause differs from ascertaining whether a warrant is so facially overbroad that it precludes reasonable reliance. *Leon* teaches that inadequate probable cause

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The panel in *KRL II* then contrasted *Ortiz* with *United States v. Kow*, 58 F.3d 423 (9th Cir. 19[9]5). In *Kow*, the warrant "authorized the seizure of virtually every document and computer file at [the business]." *Id.* at 427. In *KRL II*, we explained that in *Kow*, "approval by an attorney and a magistrate did not amount to exceptional circumstances justifying reasonable reliance by the officers, because the lack of probable cause was so obvious that any reasonable officer would conclude that the warrant was facially invalid."[12] 512 F.3d at 1190. The panel also noted that

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> does not necessarily render a warrant facially invalid nor prevent reasonable belief in the existence of probable cause. The existence of probable cause may be difficult to determine. Recognizing this, *Leon* and its progeny encourage officers to consult legal officers and rely on their opinions. Once this is accomplished, "'there is literally nothing more the policeman can do in seeking to comply with the law.'" *Id.* at 921, *quoting Stone v. Powell*, 428 U.S. 465, 498, . . . (1976) (Burger, C.J., concurring).

887 F.2d at 1370-71.

[12] *Kow* was an appeal from an order suppressing evidence. 58 F.3d at 428. It contains the following comment on severability relevant to our case:

> The government maintains that even if some categories of the warrant were overbroad, certain sections of the warrant were valid and evidence seized pursuant to these sections should not be suppressed. *See United States v. Gomez-Soto*, 723 F.2d 649, 654 (9th Cir. . . . 1984). However, "severance is not always possible." *Cardwell*, 680 F.2d at 78. In particular, "[i]f no portion of the warrant is sufficiently particularized to pass constitutional muster, then total suppression is

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in *United States v. Stubbs*, 873 F.2d 210 (9th Cir. 1989), we held that because the warrant contained no reference to criminal activity and merely described broad classes of documents, its "facial invalidity was obvious enough to preclude reasonable reliance." 512 F.3d at 1190 (citing *Stubbs*, 873 F.[2]d at 212). In both *Kow* and *Stubbs* the warrants were obviously invalid on their faces.

In *KRL II*, we were called upon to determine reasonable reliance in a more complex setting involving two warrants.[13] We held that the officers were

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required. Otherwise the abuses of a general search would not be prevented." *Id.*

Here, none of the fourteen categories of seizable documents was limited by reference to any alleged criminal activity. Only Category G, authorizing seizure of tax returns since 1983, was limited as to time. Although Category M, authorizing the seizure of all documents related to HK Video's dealings with other businesses sublicensed by HK T.V., arguably was not overbroad, "severance is not available when the valid portion of the warrant is 'a relatively insignificant part' of an otherwise invalid search." *In re Grand Jury Subpoenas*, 926 F.2d at 858 (quoting *Spilotro*, 800 F.2d at 967).

[13] *KRL II*, 512 F.3d 1184, is our second opinion in the case. We previously addressed issues of absolute and qualified immunity arising out of the underlying warrants in *KRL v. Moore*, 384 F.3d 1105 (9th Cir. 2004) ("*KRL I*"). In this opinion we explained that in April 1998, KRL had purchased a defunct gasoline station and had an underground gasoline tank removed. *Id.* at 1108. The district attorney commenced an investigation into possible environmental contamination and procured a first warrant providing for the seizure of a broad range of

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entitled to qualified immunity on a first warrant based on their reliance on review by a district attorney and the magistrate because it was not "so lacking in indicia of probable cause as to render official belief unreasonable," implicitly recognizing "that reasonable minds could disagree as to whether probable cause supported the January 11 warrant."[14] *Id.* at 1191 (internal citation omitted). We denied the officers qualified immunity on the second warrant because "[e]ven if probable cause existed to believe KRL was 'permeated with fraud' since 1995, no reasonable officer could conclude that the discovery of a 1990 ledger and several checks showed that KRL had been primarily engaged in fraudulent activity since 1990." *KRL I,* 384 F.3d at 1117. We concluded that "approval by an attorney and a magistrate did not justify reasonable reliance, because the lack of probable cause was so obvious that any reasonable officer reading the warrant would conclude that the

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documents created since January 1, 1995. *Id.* at 1108-09. The officers undertook a search pursuant to the warrant, but after finding evidence not within the scope of the warrant, they returned to the court and sought a second warrant, authorizing seizure of documents dating back to 1990. *Id.* at 1109.

[14] We explained that the first warrant "'had a more reasonable temporal limit' (limiting the search to documents dating back to 1995), 'it alleged fraudulent activity and tax evasion dating to 1997,' 'it alleged hazardous water violations in 1995 and 1996,' and 'it alleged that Womack withdrew funds from KRL for personal expenses and illegal activities.'" 512 F.3d at 1191 (quoting *KRL I,* 384 F.3d at 1116).

warrant was facially invalid. *See Kow,* 58 F.3d at 428-29." *KRL II,* 512 F.3d at 1192.

Our decisions in these cases illustrate that the objectively reasonable standard must be applied on a case-by-case basis. They also suggest that an officer's reliance on the review by a district attorney and magistrate is reasonable at least until the officer himself seeks to broaden the search warrant well beyond the scope initially approved. Even then, reliance is appropriate unless any reasonable officer would conclude that "the warrant was facially invalid."

**C. Analysis**

Our review of Supreme Court and Ninth Circuit cases addressing reasonable reliance reveals certain considerations that transform what might otherwise be an abstract question into a working guide for police officers. Among these considerations are: (1) whether it was reasonable for the officer to apply for the warrant, *see Malley,* 475 U.S. at 345; (2) whether there was sufficient probable cause to issue a warrant, *see id.*; (3) whether the warrant was facially invalid, *see Groh,* 540 U.S. at 564; (4) whether the warrant properly identified the limited matters to be searched, *see Kow,* 58 F.3d at 427; *see also Stubbs,* 873 F.2d at 212; (5) whether the officer fairly sought review by his or her superiors, counsel and a magistrate, *see KRL II,* 512 F.3d at 1190; and (6) whether the officer's misunderstanding

was reasonable even where there was no probable cause. *See Leon*, 468 U.S. at 914.

All of these factors should be applied in a manner consistent with the Supreme Court's perspective that qualified immunity should "amply" protect "all but the plainly incompetent or those who knowingly violate the law." *Malley*, 475 U.S. at 341; *see also KRL II*, 512 F.3d at 1189.

## III

The application of these factors to the present case compels a determination that the officers reasonably relied on their superiors, the district attorney, and the magistrate to correct the alleged over breadth in the search warrant.

First, as this case comes to us, we accept that it was reasonable for the officers to apply for the warrant and that there was sufficient probable cause for the warrant to issue. In the district court, plaintiffs challenged whether the affidavit established probable cause to believe that Bowen could be found at the residence, but the district court denied that claim. On this interlocutory appeal from the district court's denial of qualified immunity, we accept the district court's determination that there was sufficient probable cause to allow the officer to apply for the

nighttime search warrant and for the magistrate to issue the warrant.[15]

Second, the warrants were facially valid. They adequately identified the location to be searched, the person to be arrested, and the items to be seized. Regardless of whether there was probable cause to search for firearms and indicia of gang membership, these limited items were properly identified on the face of the warrant.[16]

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[15] Indeed, the decision to conduct a nighttime search of Mrs. Millender's home may be the most disturbing decision in this case, as Mrs. Millender appears to have had no connection with the underlying crime. Judge Fernandez, a member of the initial three-judge panel, recognized this in his concurring opinion, noting: "[w]hen I read and reread the warrant and the affidavit that supports it, I come away with the feeling that there is extremely little support for the search of a third person's home for all firearms and ammunition." *Millender v. County of Los Angeles*, 564 F.3d 1143, 1151 (9th Cir. 2009). Mrs. Millender's connection to Bowen appears to be that at one time she had been Bowen's foster mother. However, the district court held that the decision to conduct a nighttime search of the residence was reasonable, and accordingly, we view the warrant in that light.

[16] The majority's concern with the "breadth" of the warrant is really a concern with whether there was probable cause to support the questioned provisions of the warrant. *See* Op. 12722, 12728. In the case relied upon by the majority, *United States v. SDI Future Health*, 568 F.3d 684 (9th Cir. 2009), we explained that for a warrant not to be "overbroad" there must be probable cause to seize the particular thing named in the warrant, and that this means "a fair probability that contraband or evidence of a crime will be found in a particular place, based on the totality of circumstances." *Id.* at 702-03 (quoting *United States v.*

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Third, Officer Messerschmidt scrupulously followed the proper procedures in seeking the arrest and search warrants. The warrant affidavit was reviewed by his sergeant and Messerschmidt consulted a lieutenant. Moreover, the warrants were reviewed by a deputy district attorney before they were presented to, reviewed by, and signed by a magistrate. Messerschmidt followed the Supreme Court directions in *Leon* to seek the "detached scrutiny of a neutral magistrate." 468 U.S. at 913.

Despite accepting that there were reasonable grounds for seeking the warrants, that there was sufficient probable cause to issue the search warrant, that the warrant was facially valid, and that the proper procedures were followed to have the warrants reviewed and approved by a neutral magistrate, the majority nonetheless concludes that the absence of probable cause for two sections of the warrant was so obvious that the officer is not entitled to qualified immunity. Despite our observation, and the Supreme Court's observation, that "reasonable minds frequently may differ on the question whether a particular affidavit establishes probable cause," *KRL II*, 512 F.3d at 1189 (quoting *Leon*, 468 U.S. at 914), the majority, in essence, considers the officer to have been incompetent or dishonest. Initially, it should be noted that the majority does not suggest that the

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*Diaz*, 491 F.3d 1074, 1078 (9th Cir. 2007)). Probable cause is discussed later in this dissent.

officer was dishonest. Although the plaintiffs in the district court argued that the officer had failed to present the magistrate with all the relevant facts, the district court rejected those contentions, and there is nothing in the majority's opinion that resurrects that contention. Rather, the majority's opinion basically holds that the lack of relationship between the charged crime by Bowen and certain items described in the search warrant was so obvious that the officer may be held personally liable for having entertained a contrary thought. Of course, in light of my perspective on whether the search might include firearms other than the sawed-off shotgun, I think that the officer's inclusion of other firearms in the warrant, if not proper, was certainly objectively reasonable.

How could the officer have thought that he could search for indicia of gang membership? We must ask this question based on what the officer knew when he prepared his affidavit. Here, we agree that the officer knew that Bowen had fired a sawed-off shotgun at a person in public, that he was a felon, and that he had ties with a street gang. We also accept that the officer reasonably believed that Bowen was "hiding out" at the house on 120th Street. Why are these "facts" not sufficient to allow the officer initially to include a search for indicia of gang membership in his warrant

application? Indeed, the affidavit in support of the warrant offered precisely this line of reasoning.[17]

It appears that ultimately there was no evidence of a link between Bowen's assault on Kelly with a deadly weapon and his membership in a street gang, but the officer did not know this when he applied for the warrant. Given that Bowen was a felon, a gang member, and had used a sawed-off shotgun, the possession of which might well be illegal, the officer may reasonably have conceived of possible ties between the crime, the weapon and the gang. I do not disagree with the district court's and the majority's determination that nevertheless there was insufficient probable cause to support a warrant for indicia of gang membership. Rather, my point is only that it was reasonable for the officer to think that there might be sufficient probable cause, at least to include the request in the initial application that would then be reviewed by his superiors, a deputy district attorney and a magistrate. *See KRL II,* 512 F.3d at 1192 (indicating that officers should not be required "to

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[17] The officer set forth his specialized training in the field of gang-related crimes, and his participation in hundreds of interviews with individuals who had been sentenced or were about to be sentenced. He stated that these interviews provided him with "information pertaining to the manners in which gang-related assaults are committed, the motives for such assaults, and the concealment of weapon(s) used in such assaults." He further stated that his investigation had shown that Bowen had gang ties to the Mona Park Crip gang, and asserted that this fact in connection with the nature of the underlying crime justified night service of the warrant.

question reasonable assessments of probable cause by government attorneys and magistrates").

The officer may well have made factual and legal mistakes. *See Groh,* 540 U.S. at 566-67 (J. Kennedy, dissenting). He may have thought that the facts that Bowen was a felon, a gang member, and had committed an assault with a deadly weapon created probable cause to search for indicia for gang membership. He was wrong, but objectively viewed, his mistake was not objectively unreasonable.[18]

One way of ascertaining whether a mistaken belief was reasonable is to compare it to other cases where we have found that an officer was not entitled to qualified immunity. I can find no clear precedent that supports the majority's conclusion. In *Kow,* 58 F.3d 423, "the lack of probable cause was so obvious that any reasonable officer would conclude that the

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[18] Contrary to the majority's assertion, *see* Op. at 12739-40, this conclusion is not based on the dissenting opinion in *Malley* and *Groh,* but on the application of the standard set forth in those opinions. The determination of whether a "well trained officer would have known that the search was illegal despite the magistrate's authorization" (*Leon,* 468 U.S. at 922 n.23), requires an evaluation of the particular facts of the case. In *Malley,* the Court did not determine whether "petitioner's conduct . . . was in fact objectively reasonable." 475 U.S. at 345 n.8. In *Groh,* the Court referred to this as "the particularity requirement." 540 U.S. at 563. It is in the application of the "particularity requirement" to a specific fact situation that the dissents in *Malley* and *Groh* are relevant when evaluating whether the officer "should not have applied for the warrant." *Malley,* 475 U.S. at 545.

warrant was facially invalid." *KRL II*, 512 F.3d at 1190. Similarly, the warrant in *Stubbs*, 873 F.2d 210, was facially invalid. *KRL II*, 512 F.3d at 1190. Perhaps the most analogous case is *KRL II*. There, we denied qualified immunity to Officer Hall because we found that "*no reasonable officer* could conclude that the discovery of a 1990 ledger and several checks showed that KRL had been primarily engaged in fraudulent activity since 1990." 512 F.3d at 1192 (quoting *KRL I*, 384 F.3d at 1117). However, our denial of qualified immunity was based on: (1) Hall's "leadership role in the overall investigation;" (2) our factual determination that "the discovery of a ledger and several checks predating the allegedly fraudulent activity by five years did not provide sufficient probable cause to search for documents dating back to 1990;" and (3) our conclusion that the warrant was obviously facially invalid. *KLR II*, 512 F.3d at 1192-93. Although Officer Messerschmidt may have been in charge of the investigation of Bowen, he did not have a leadership position similar to that held by Hall in *KRL II*.[19] Furthermore, his incorrect factual conclusion was not as far-fetched as that in issue in *KRL II*, and the warrant was not obviously facially invalid.

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[19] Unlike Officer Hall who executed the search at issue in *KRL II*, 384 F.3d at 1109, Officer Messerschmidt was assigned to traffic control on the street during the search of the Millender residence.

It might also be noted that in 2003, when Messerschmidt sought the warrant, neither of our opinions in *KRL* had issued. However, we had decided *Ortiz,* 887 F.[2]d 1366. In that case, the officer sought a warrant to search a home for weapons and explosives based on only four telephone calls by the same anonymous person. *Id.* at 1367. Nonetheless, while finding that there was no probable cause to support the warrant, we granted the police officer qualified immunity, commenting that an "error of constitutional dimensions may have been committed with respect to the issuance of the warrant, but it was the judge, not police officers who made the critical mistake." *Id.* at 1369. I would hold that here, as in *Ortiz,* the officer's "conduct was 'sufficient to establish objectively reasonable behavior.'" *Id.* at 1371 (quoting *United States v. Freitas,* 856 F.2d 1425, 1431 (9th Cir. 1988)).

Moreover, the majority's opinion appears to extend unnecessarily the guiding Supreme Court opinions. In *Malley,* the Court stated that the question was "whether a reasonably well-trained officer in petitioner's position would have known that his affidavit failed to establish probable cause and that he should not have applied for the warrant." 475 U.S. at 345. In *Groh,* the Court denied qualified immunity because the warrant "did not describe the items to be seized *at all*" and "was so obviously deficient that we must regard the search as 'warrantless' within the meaning of our case law." 540 U.S. at 558. Here, there is really no question that there was probable cause to issue the warrant and that it was not facially invalid.

I recognize that each provision of a search warrant should be supported by probable cause. *See In re Grand Jury Subpoenas Dated Dec. 10, 1987*, 926 F.2d 847, 857 (9th Cir. 1991) (stating that "probable cause must exist to seize all the items of a particular type described in the warrant"). Nonetheless, we have held in appeals from suppression orders that evidence from valid portions of a warrant may be severed from invalid portions.[20] Similarly, we should recognize that the lack of probable cause for one clause in an otherwise valid warrant does not mean that the officer's decision to seek the warrant, or even to include that clause in the warrant, was necessarily unreasonable.[21] Instead, at least where the warrant is supported by probable cause and is facially valid, but there is some question as to the sufficiency of evidence to support a section of the warrant, then absent

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[20] In *SDI Future Health*, we "endorsed a doctrine of severance," noting that we had "previously allowed severance when a warrant lacked particularity because of some unduly broad language in the warrant." 568 F.3d at 707 (internal citation omitted). We commented that we do not allow severance where "the valid portion of the warrant is 'a relatively insignificant part' of an otherwise invalid search." *Id.* (quoting *Kow*, 58 F.3d at 428). Here, the focus of the search was for Bowen and his sawed-off shotgun. It seems doubtful that had he or the shotgun been found, that evidence would have been suppressed because of the overbreadth of the warrant.

[21] Of course, the operating premise remains that there was no probable cause to support the particular section of the warrant. What is at issue is only the second prong for qualified immunity, whether the officer, in good faith, could have relied on the magistrate.

some showing of bad faith on the part of the officer or of a failure to present all the relevant known facts to the magistrate (*see Leon,* 468 U.S. at 923), the officer should be allowed to rely on his superiors, the district attorney and the magistrate to correct any overbreadth. Certainly, that should be the case here, as the officer's affidavit clearly sets forth the basis on which the officer mistakenly thought he could seek a warrant to search for indicia of gang membership.

Moreover, the two provisions of the warrant at issue – those authorizing searches for firearms and for indicia of gang membership – do not appear to have been very important either when the warrant was initially sought or later. First, as noted, the primary purpose of the search was to arrest Bowen. Second, because the district court upheld the warrant's provision allowing the search for, and seizure of, indicia of home ownership, and because the majority concedes that the officers were entitled to search for disassembled parts of the sawed-off shotgun, the questioned provisions did not expand the actual scope of the search. Third, as the search only resulted in the seizure of Mrs. Millender's shotgun and a box of ammunition (and no indicia of gang membership), it does not appear that plaintiffs were really harmed by the search authorized by the questioned provisions of the warrant (as contrasted to the entry into the home and the general search). As Justice Kennedy noted in his dissent in *Groh,* the Supreme Court has stressed that "'the purpose of encouraging recourse to the warrant procedure' can

be served best by rejecting overly technical standards when courts review warrants." 540 U.S. at 571 (quoting *Gates*, 462 U.S. at 237). Here, even accepting that there was no probable cause to support the questioned provisions of the warrant, because this defect did not expand the scope of the search nor cause any real harm to the plaintiffs, it should not defeat an otherwise appropriate grant of qualified immunity.

This conclusion is reinforced by the purpose of qualified immunity: to "amply" protect officers other than "the plainly incompetent or those who knowingly violate the law." *KRL II*, 512 F.3d at 1189 (quoting *Malley*, 475 U.S. at 341). Here, as noted, there is no suggestion that the officer "knowingly violated the law." While the majority concludes that the officer should have known that the search warrant was too broad, the length it has to go to make that point suggests that an officer's failure to so reason cannot be considered plain incompetence. Indeed, the very fact that judges on this en banc panel disagree on this point, in itself, weighs in favor of granting qualified immunity.

## IV

Last, but not least, I am concerned that the majority's parsing of the search warrant will lead to uncertainty and needless litigation. Denying qualified immunity where, as here, the defect in the warrant (a lack of probable cause for two sections of a warrant) did not expand the scope beyond what was

constitutional and did not cause any real harm, creates considerable incentive to challenge all but the narrowest of warrants. Even if the overbreadth of a warrant does not produce any evidence and does not result in any real harm, a disgruntled person can overcome a claim of qualified immunity by showing that the officer did not have probable cause to support some part of the warrant. This seems contrary to the purpose of qualified immunity. *See Malley,* 475 U.S. at 141.

Moreover, the approach may well interfere with a police officer's ability to properly protect the public and investigate crimes. Instead of investigating a possible relationship between an assault with a deadly weapon by a convicted gang member and the felon's street gang, the majority would hold the officer personally liable for not grasping that these facts did not support the issuance of a warrant for anything other than the felon and the particular weapon. This appears to be the type of "high level of generality" that Justice Thomas warned against in his dissent in *Groh,* 540 U.S. at 578. Furthermore, this approach may well discourage officers from following up on leads that they would otherwise bring to the attention of their superiors for fear of personal liability if they unwittingly err in their judgment.

* * *

To recap, although I think that the officer could reasonably have sought to search for firearms other than the shotgun, I agree with the majority that

there was not a sufficient showing of a relationship between the assault and gang membership to provide probable cause for the inclusion of indicia of gang membership in the search warrant. But, applying the factors stressed by the Supreme Court and our court, I cannot conclude that the officer's inclusion of the provision in the warrant was so objectively unreasonable as to preclude reliance on the approval of his supervisors, the district attorney and the magistrate. It was reasonable for the officer to apply for the warrant, there was probable cause to issue the warrant, the warrant was not facially invalid, the warrant properly identified the limited matters to be seized, and the officer followed the proper procedures for seeking review by his superiors, a district attorney and a magistrate. Moreover, at least as to the questioned provisions, it does not appear that the officer hid any relevant information from his superiors or the magistrate and his affidavit plainly presented the grounds on which he sought indicia of gang membership. Furthermore, I have found no precedent that suggests that an officer may not rely on his superiors and the magistrate when he makes an honest mistake in thinking that there is probable cause to support a provision in an otherwise valid warrant. The majority's contrary conclusion is of little real benefit to the plaintiffs, and unfairly punishes a line officer for what, at most, was a failure on the part of his superiors, the deputy district attorney and the

magistrate, to properly limit the warrant.[22] Here, as in *Ortiz,* an "error of constitutional dimensions may have been committed with respect to the issuance of the warrant, but it was the judge, not the police officers who made the critical mistake." 887 F.2d at 1369. I would hold that the officer's application for a search warrant which included searching for other firearms and indicia of gang membership was not objectively unreasonable and that the officer is entitled to qualified immunity.

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SILVERMAN, Circuit Judge, with whom TALLMAN, Circuit Judge, joins, dissenting:

I join Parts II through IV of Judge Callahan's dissent, but write separately to emphasize several points.

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[22] There is some irony in judges, who enjoy judicial immunity, holding that a line police officer may be personally liable for the breadth of a warrant when the system as set forth by the Supreme Court depends on the "detached scrutiny of a neutral magistrate" (*Leon,* 468 U.S. at 913), and the magistrate failed to properly perform his or her duty. The officer's mistake was clear from his affidavit. He thought that the facts that Bowen had committed an assault with a deadly weapon, and was a felon and a gang member were sufficient to allow for the search of indicia of gang membership. There is no suggestion that the officer hid anything from his superiors, the district attorney, or the magistrate. However, as the magistrate has judicial immunity, blame cascades down on the line officer. As Gilbert & Sullivan noted in *The Pirates of Penzance:* "a policeman's lot is not a happy one."

The doctrine of qualified immunity "protects government officials from liability for good faith misjudgments and mistakes," and that is precisely the situation here. *Clement v. Gomez,* 298 F.3d 898, 903 (9th Cir. 2002). The judge issued a defective warrant and the deputies mistakenly relied on it, but their mistake was entirely in good faith. The deputies did not act *until* they obtained the warrant and they did only what the warrant authorized them to do. They did not engage in any form of misconduct. They did not rough-up the residents. They did not put false information in the affidavit, conceal exculpatory information, or seize property not mentioned in the four-corners of the warrant. This is not a case where police officers sought to evade the warrant requirement; to the contrary, they sought to comply with it. The record is totally devoid of any evidence that the deputies acted other than in good faith.

Qualified immunity protects from liability "all but the plainly incompetent and those who knowingly violate the law." *Malley v. Briggs,* 475 U.S. 335, 341 (1986). Does the deputies' mistake rise to the level of plain incompetence or intentional violation of the law? I cannot imagine a clearer case of reasonable error than this one. In determining whether the deputies reasonably relied on the warrant, "all of the circumstances . . . may be considered." *United States v. Leon,* 468 U.S. 897, 923 n.23 (1984). It is undisputed that the deputies knew Bowen to be a convicted felon with a very violent history, including convictions for assault with a deadly weapon and

being a felon in possession of a firearm. They also knew that he reportedly had just shot at the victim several times with a short-barrel shotgun. As a convicted felon, Bowen was prohibited from possessing firearms. Under such circumstances, how can it be "entirely unreasonable" – not just a mistake but *entirely unreasonable* – for the deputies to have relied on a judge-signed warrant authorizing the seizure of all of Bowen's guns? *See Ortiz v. Van Auken*, 887 F.2d 1366, 1370 (9th Cir. 1989).

I also do not see how the deputies can be deemed to be plainly incompetent, or to have knowingly violated the law, for relying on the warrant's authorization to seize Mona Park Crip gang paraphernalia. The deputies had probable cause to believe both that Bowen was tied to the Mona Park Crip gang and that he was residing at the Millender residence. Had Mona Park Crip paraphernalia been found in close proximity to guns during the search of the Millender house – say, a gun concealed in Mona Park Crip clothing – such a discovery would have tended to prove that the guns were Bowen's and not the Millenders'. It is commonplace for search warrants to authorize the seizure of items that can help identify persons in control of the premises or contraband. *See Ewing v. City of Stockton*, 588 F.3d 1218, 1229 (9th Cir. 2009). The deputies' belief in the validity of this portion of the warrant was entirely reasonable.

Qualified immunity insulates police officers from the threat of personal liability so that they can "execute [their] office with the decisiveness and the

judgment required by the public good." *Scheuer v. Rhodes*, 416 U.S. 232, 240 (1974). The tradeoff for this perceived societal benefit is that some wrongs will go uncompensated. That is the nature of immunity, and it is a tradeoff adopted by the Supreme Court itself.

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**FOR PUBLICATION**

**UNITED STATES COURT OF APPEALS**

**FOR THE NINTH CIRCUIT**

**AUGUSTA MILLENDER; BRENDA MILLENDER; WILLIAM JOHNSON,**

Plaintiffs-Appellees,

v.

**COUNTY OF LOS ANGELES; ROBERT J. LAWRENCE; CURT MESSERSCHMIDT,**

Defendants-Appellants,

and

**LOS ANGELES COUNTY SHERIFF'S DEPARTMENT; SHERIFF LEROY BACA; SCOTT WALKER; RICK RECTOR; DONALD NICHIPORUK; RICHARD SCHLEGEL; DEPUTY BRICE STELLA; JACK DEMELLO; DAVID O'SULLIVAN; JAMES RITENOUR; IAN STADE,**

Defendants.

No. 07-55518

D.C. No. CV-05-02298-DDP

**ORDER**

(Filed Oct. 2, 2009)

**KOZINSKI**, Chief Judge:

**Upon the vote of a majority of nonrecused active judges, it is ordered that this case be reheard en banc pursuant to Circuit Rule 35-3. The three-judge panel opinion shall not be cited as precedent by or to any court of the Ninth Circuit.**

**Judge Pregerson did not participate in the deliberations or vote in this case.**

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**FOR PUBLICATION**

**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

AUGUSTA MILLENDER,
BRENDA MILLENDER,
WILLIAM JOHNSON,

*Plaintiffs-Appellees,*

v.

COUNTY OF LOS ANGELES,
LOS ANGELES COUNTY SHERIFF'S
DEPARTMENT, SHERIFF LEROY
BACA, SCOTT WALKER, RICK
RECTOR, DONALD NICHIPORUK,
RICHARD SCHLEGEL, DEPUTY
BRICE STELLA, JACK DEMELLO,
DAVID O'SULLIVAN, JAMES
RITENOUR, IAN STADE,
ROBERT J. LAWRENCE AND
CURT MESSERSCHMIDT,

*Defendants-Appellants.*

No. 07-55518

D.C. No.
CV-05-02298-DDP

OPINION

Appeal from the United States District Court
for the Central District of California
Dean D. Pregerson, District Judge, Presiding

Argued and Submitted
Oct. 21, 2008 – Pasadena, California

Filed May 6, 2009

Before: Ferdinand F. Fernandez,
Consuelo M. Callahan and
Sandra S. Ikuta, Circuit Judges.

Opinion by Judge Callahan;
Concurrence by Judge Fernandez;
Dissent by Judge Ikuta

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## COUNSEL

Eugene P. Ramirez (argued) and Julie M. Fleming of Manning & Marder, Kass, Ellrod, Ramirez, LLP, of Los Angeles, California for the defendants-appellants.

Olu K. Orange (argued), Robert Mann, and Donald W. Cook of Los Angeles, California for the plaintiffs-appellees.

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## OPINION

CALLAHAN, Circuit Judge:

This § 1983 action arises out of a nighttime search and seizure. In a comprehensive opinion, the district court granted qualified immunity to some defendants on some issues and denied it on others. This interlocutory appeal by the City of Los Angeles and two deputy sheriffs, Detective Messerschmidt and Sergeant Lawrence, challenges only two aspects of the district court's order: the denial of qualified immunity on the scope of the search warrant to cover (1) evidence of gang affiliation and (2) all firearms and firearms-related items. We reverse the district court's denial of qualified immunity because we conclude that the officers were entitled to immunity under the second prong of the test set forth in *Saucier v. Katz*, 533 U.S. 194, 201 (2001), as they reasonably

relied on the approval of the warrant by a deputy district attorney and a judge.

I

Ms. Kelly had an ongoing relationship with Mr. Bowen, but decided to break off the relationship and move out of the residence on W. 97th Street because of Bowen's violent temper and his physical assaults on her. She asked for a sheriff deputy to watch her while she gathered some property from the residence. Two deputies accompanied Kelly to the residence, but were then called away to respond to an emergency.

As soon as the deputies left, Bowen appeared and attacked Kelly. Kelly managed to escape from Bowen and ran to her car. Bowen then retrieved a black sawed-off shotgun with a pistol grip from the residence. He ran in front of Kelly's car, pointed the gun at Kelly and stated that he would kill her if she tried to leave. Kelly leaned over in her seat and pushed the gas pedal all the way down. Bowen jumped out of the way, fired a round at the car blowing out the front left tire, and chased the car firing another four rounds. Kelly was able to drive away and locate a police officer.

Detective Messerschmidt was assigned to investigate the assault. He reviewed Bowen's criminal history and determined that he had multiple felony and misdemeanor arrests. He met with Kelly and verified the facts of the incident with her. Kelly told him that she thought that Bowen might be staying at

his foster mother's home on E. 120th Street. Kelly also stated that she had been to the foster mother's (Mrs. Millender's) home with Bowen.

Messerschmidt prepared an affidavit in support of a search warrant for the 120th Street residence. The affidavit states that Messerschmidt had 14 years' experience as a peace officer, was a "Gang Investigator," and had considerable training and experience as a gang detective. The affidavit recited Kelly's representations of the assault, noting that Bowen had fired a black sawed-off shotgun with a pistol grip. Messerschmidt stated that he had "conducted an extensive background search on the suspect by utilizing departmental records, state computer records, and other police agency records," and that he had determined that Bowen resided at the 120th Street residence.

The affidavit further requested night service of the search warrant because the investigation had shown that Bowen "has gang ties to the Mona Park Crip gang" and because the nature of the crime – assault with a deadly weapon – "goes to show that night service would provide an added element of safety to the community as well as for the deputy personnel serving the warrant, based on the element of surprise."

The warrant allowed for the search and seizure of (1) articles of personal property tending to establish

the identity of persons in control of the premises, (2) all firearms and firearm-related items,[1] and (3) articles of evidence showing, or relevant to, gang membership.[2] The search warrant was reviewed by a sergeant, a police lieutenant, and a deputy district

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[1] Specifically, the search warrant allowed the search and seizure of:

> All handguns, rifles or shotguns of any caliber, or any firearms capable of firing ammunition or firearms or devices modified or designed to allow it to fire ammunition. All caliber of ammunition, miscellaneous gun parts, gun cleaning kits, holsters which could hold or have held any caliber handgun being sought. Any receipts or paperwork, showing the purchase, ownership, or possession of the handguns being sought. Any firearm for which there is no proof of ownership. Any firearm capable of firing or chambered to fire any caliber ammunition.

[2] The search warrant also allowed the search and seizure of:

> Articles of evidence showing street gang membership or affiliation with any Street Gang to include but not limited to any reference to "Mona Park Crips," including writings or graffiti depicting gang membership, activity or identity. Articles of personal property tending to establish the identity of persons in control of the premise or premises. Any photographs or photograph albums depicting persons, vehicles, weapons or locations, which may appear relevant to gang membership, or which may depict the item being sought and or believed to be evidence in the case being investigated on this warrant, or which may depict evidence of criminal activity. Additionally to include any gang indicia that would establish the persons being sought in this warrant, affiliation or membership with the "Mona Park Crips" street gang.

attorney, before it was presented to, and signed by, a judge.

The warrant was served at 5:00 a.m. on November 6, 2003. Within seconds of announcing their presence, the deputies broke into the front window and front door. Upon entering the house, the deputies encountered Mrs. Millender (who was in her seventies), her daughter and grandson. They followed the deputies' instructions and went outside pending the completion of the search.

The deputies did not find Bowen or the shotgun at the residence. The search did result in the seizure of Mrs. Millender's personal shotgun (Mossberg 12 gauge, black with a wood stock), a State of California Social Services letter addressed to Bowen, and a box of .45-caliber ammunition.[3]

Mrs. Millender, her daughter and grandson (sometimes referred to as plaintiffs) filed this action in the District Court for the Central District of California. The complaint named the County of Los Angeles, the sheriff's department, the sheriff, and a number of individual deputies as defendants. It contained several claims under 42 U.S.C. § 1983 for alleged violations of the Fourth and Fourteenth Amendment and for conspiracy to deprive plaintiffs of

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[3] Bowen was arrested two weeks later. In the middle of the day, Messerschmidt knocked at the door of a motel room. He was admitted by Bowen's wife and found Bowen hiding under the bed.

their civil rights based on their race. The complaint also set forth supplemental state claims.

II

The parties filed cross-motions for summary judgment. The district court found that the warrant was facially valid, that Messerschmidt's conduct was reasonable, that there was probable cause to believe Bowen was at the residence, and that the affidavit adequately supported nighttime service. These determinations are not in issue on appeal.

The district court then addressed the scope of the warrant. Three aspects of the warrant were challenged: (1) the seizure of all firearms and firearm-related items; (2) the seizure of articles of evidence showing, or relevant to, gang membership; and (3) the seizure of articles of personal property tending to establish the identity of persons in control of the premises.

The district court found that the warrant was overbroad in two respects:

> First, as to Plaintiffs' contentions regarding the search for firearms, it is undisputed that: (1) Bowen was accused of assaulting Kelly with a specifically-described sawed-off shotgun; (2) that Kelly gave Defendants a photograph of Bowen with the shotgun; and (3) that the affidavit did not mention any other weapons or crimes. Defendants argue that, even so, the warrant was reasonably

> specific, because "any caliber of shotgun or receipts would show possession of and/or purchase of guns." This argument is nonsensical and unpersuasive. The crime specified here was a physical assault with a very specific weapon. Therefore, defendants were not entitled to search for all firearms and the warrant was overbroad in this respect.
>
> Second, Plaintiffs argue that the authorization to seize gang-related information was overbroad, because, as Messerschmidt admitted, there is no evidence that the crime at issue was gang-related. In response, Defendants make the unsupported statement that "[t]he photos sought re gang membership could be linked with other gang members, evidencing criminal activity as gang affiliation is an enhancement to criminal charges." This argument is unconvincing. Plaintiffs are correct that California Penal Code § 186.22(b)(1) limits gang enhancements to cases where the underlying crime was gang-related. . . . Defendants do not point to any other basis for their argument or make any additional arguments. Therefore, this court finds that the warrant is overbroad in its authorization to seize gang-related items.

The district court rejected plaintiffs' challenge to the warrant's authorization to seize evidence concerning control of the premises. It held that the fact that defendants had a picture of Bowen with the shotgun did not prevent them from seeking additional ways of tying Bowen to the weapon. It noted that even if the

defendants knew that Mrs. Millender owned the residence, Bowen could also have controlled the premises to the extent that he could have stored a weapon there.[4] In addition, the district court noted that although defendants contended that an overbroad warrant may be valid if the supporting affidavit provides more guidance, here the affidavit was no more specific than the warrant.

The district court did not specifically address the second prong of the *Saucier* test: that the "contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Saucier,* 533 U.S. at 202 (internal quotation marks and citation omitted). It only noted that defendants had "made no additional arguments as to why, even if the warrant was overbroad, the officers acted reasonably, without knowing that what they were doing was wrong."

III

We recently set forth our jurisdiction and the standard of review on an appeal such as this one in *KRL v. Estate of Moore,* 512 F.3d 1184 (9th Cir. 2008). We stated:

> Although a denial of summary judgment is ordinarily not an appealable interlocutory order, we have jurisdiction in this case

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[4] Plaintiffs do not challenge this decision in their appeal.

> because the motion for summary judgment is based on qualified immunity. *Lee v. Gregory*, 363 F.3d 931, 932 (9th Cir. 2004). We review the district court's denial of summary judgment de novo. *Id.* Our jurisdiction is limited to questions of law, and does not extend to qualified immunity claims involving disputed issues of material fact. *Jeffers v. Gomez*, 267 F.3d 895, 903 (9th Cir. 2001). Where disputed facts exist, we assume that the version of the material facts asserted by Plaintiffs, as the non-moving party, is correct. *Id.*

512 F.3d at 1188-89.

As we noted in *KRL*, where a constitutional violation occurs, a police officer is entitled to qualified immunity if he acted reasonably under the circumstances. *KRL*, 512 F.3d at 1189. The Supreme Court in *Saucier v. Katz*, 533 U.S. 194, outlined a two-step approach to qualified immunity. The first inquiry is whether "[t]aken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?" *Id.* at 201. If the answer to the first inquiry is yes, the second inquiry is whether the right was clearly established: in other words, "whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Id.* at 202.

In *KRL*, we further explained the impact of a magistrate's approval on officer's belief that a warrant is valid.

Qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." *Lee,* 363 F.3d at 934 (quoting *Malley v. Briggs,* 475 U.S. 335, 341 . . . (1986)). In *United States v. Leon,* 468 U.S. 897 . . . (1984), the Supreme Court recognized that "[r]easonable minds frequently may differ on the question whether a particular affidavit establishes probable cause. . . ." *Id.* at 914. . . . Inadequate probable cause for a warrant does not necessarily render an officer's reliance unreasonable because the existence of probable cause is often a difficult determination. *Ortiz v. Van Auken,* 887 F.2d 1366, 1370-71 (9th Cir. 1989). Rather, "the preference for warrants is most appropriately effectuated by according 'great deference' to a magistrate's determination." *Leon,* 468 U.S. at 914. . . .

When reasonable minds could differ as to the existence of probable cause, approval of a warrant by a government attorney and ratification by a neutral and detached magistrate usually establishes objectively reasonable reliance. *Ortiz,* 887 F.2d at 1369-70. Courts treat magistrates as more qualified than police officers to make determinations of probable cause. *See, e.g., Malley,* 475 U.S. at 346 n. 9. . . . As a general matter, the Constitution does not require officers to "second-guess the legal assessments of trained lawyers." *Arnsberg v. United States,* 757 F.2d 971, 981 (9th Cir. 1985); *see also Leon,* 468 U.S. at 921 . . . ("In the ordinary case, an officer cannot be expected to question the

> magistrate's probable-cause determination or his judgment that the form of the warrant is technically sufficient.").
>
> Officers lose their shield of qualified immunity "[o]nly where the warrant application is so lacking in indicia of probable cause as to render official belief in its existence unreasonable." *Malley,* 475 U.S. at 344-45 . . . (citing *Leon,* 468 U.S. at 923 . . . ). In other words, an officer who prepares or executes a warrant lacking probable cause is entitled to qualified immunity unless "no officer of reasonable competence would have requested the warrant." *Id.* at 346 n. 9. . . . When a warrant is so bereft of probable cause that official reliance is unreasonable, the officer executing the warrant "cannot excuse his own default by pointing to the greater incompetence of the magistrate." *Id.*

512 F.3d at 1189-90.

IV

The district court, as required by the law in effect at the time, properly considered whether the warrant was overbroad with respect to firearms and evidence showing gang membership. On January 21, 2009, the Supreme Court in *Pearson v. Callahan,*129 S.Ct. 808 (2009), held that "judges of the district courts and the courts of appeals should be permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the

particular case at hand." *Id.* at 818. It further stated that "the judges of the district courts and the courts of appeals are in the best position to determine [what] order of decisionmaking will best facilitate the fair and efficient disposition of each case." *Id.* at 821. We need not review the district court's finding that the warrant was overbroad because we determine that even if it were overbroad, Messerschmidt and Lawrence are entitled to qualified immunity under the second prong of the *Saucier* test.

V

The record shows that Messerschmidt and Lawrence reasonably relied on the approval of the search warrant by a deputy district attorney and a judge. Although they may not have stressed the argument in the district court, our review of the record shows that the deputies raised their reliance on the approval of the search warrant in their motion for summary judgment. Moreover, the record shows that the warrant was presented to and signed by a state court judge, and plaintiffs do not allege that there were any irregularities in the processing of the warrant. Accordingly, we consider the deputies' immunity under the second prong of the *Saucier* test, assuming the version of the material facts asserted by the plaintiffs. *KRL*, 512 F.3d at 1189.

Messerschmidt's affidavit stated that Bowen had engaged in an assault with a deadly weapon, had ties with a gang, and probably had a criminal record.[5] Accordingly, an officer may reasonably have thought that the warrant could include the search for, and seizure of, firearms other than the sawed-off shotgun, as well as evidence relating to gang affiliation. The record, even read in a light most favorable to plaintiffs is not "so lacking in indicia of probable cause as to render an officer's belief in its existence 'entirely unreasonable.'" *Ortiz v. Van Auken,* 887 F.2d 1366, 1370-71 (quoting *United States v. Leon,* 468 U.S. 897, 923 (1984).

The reasonableness of the officers' perspective is clear when this case is compared to the cases cited in *KRL*, in which officers were not entitled to rely on the approval of an attorney and a magistrate. *Id.* In *United States v. Kow,* 58 F.3d 423, 428 (9th Cir. 1995), the warrant "listed entire categories of documents to be seized, encompassing essentially all documents on the premises." In *United States v. Stubbs,* 873 F.2d 210, 212 (9th Cir. 1989) the warrant "contained no reference to criminal activity, and merely described broad classes of documents." Although the warrant in

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[5] Although the affidavit did not state that Bowen had a criminal record, the existence of such a record is a reasonable inference from the affidavit's statements concerning the nature of the crime and the weapon used, as well as its representation that Bowen "has gang ties to the Mona Park Crip gang based on information provided by the victim and the cal-gang data base."

this case may have been overbroad, it was limited to firearms and firearm-related items and evidence related to gang membership. The inclusion of these enumerated materials arose out of the officer's particular concerns with Bowen, if not with the specific crime under investigation. In any event, the deputies could reasonably have expected the deputy attorney general and the state judge to limit the warrant if it sought items for which there was no probable cause.

In *KRL*, we reiterated the Supreme Court's perspectives that "[r]easonable minds frequently may differ on the question whether a particular affidavit establishes probable cause," and that "the preference for warrants is most appropriately effectuated by according 'great deference' to a magistrate's determination." *KRL*, 512 F.3d at 1189 (quoting *Leon*, 468 U.S. at 914). There is nothing in this record to support a departure from this approach. Accordingly, as the record shows that Messerschmidt and Lawrence could reasonably rely on the deputy district attorney and the judge to limit the scope of the warrant to items covered by the showing of probable cause, their reliance on the warrant as signed by the judge was reasonable and they are entitled to qualified immunity under the second prong of *Saucier*, 533 U.S. at 202. In other words, we do not think that here it would have been "clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Id.*

VI

In sum, accepting, but not ruling on, the district court's determination that the warrant was overbroad, *see Pearson,* 129 S.Ct. 808, we determine that on this record, even when viewed in a light most favorable to plaintiffs, the deputies could reasonably defer to the review of the warrant by a deputy district attorney and a judge. *See Leon,* 468 U.S. at 921; *KRL,* 512 F.3d at 1189. Accordingly, Detective Messerschmidt and Sergeant Lawrence are entitled to qualified immunity for the overbreadth of the warrant under the second prong of the *Saucier* test. *See Saucier,* 533 U.S. at 202. The district court's denial of qualified immunity is **VACATED,** and the case is **REMANDED** with instructions to grant Detective Messerschmidt and Sergeant Lawrence qualified immunity on the challenged scope of the warrant.

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FERNANDEZ, Circuit Judge, concurring:

I concur, but in light of the strong majority opinion and the strong dissent, I should explain further.

Although we need not decide the issue, I am satisfied that the warrant was overbroad and that the search, therefore, violated the constitutional rights of the Millenders. But, of course, the officers did not merely act on their own. They had a warrant. In seeking the warrant, they had asked a superior

officer to review the affidavit and the proposed scope of the warrant. It was approved. It was then submitted to a deputy district attorney, who also approved it. Then, of course, it was submitted to a judge for his approval. He signed it with no apparent caveats or misgivings. In other words, in that sense, the officers did precisely what we want them to do. As we said over fifteen years ago in a slightly different context, where a judicially issued warrant was not involved:

> The appellants did not simply act rashly and without regard to [a person's] legal or constitutional rights. Rather, they did just what the courts encourage officials to do. They sought an expert legal opinion before they acted.
>
> We have previously had occasion to comment upon that kind of responsible behavior by police officials.
>
> . . . .
>
> In fine, when the employees of LAPD were faced with what can only be called a complex and uncertain legal issue, they sought legal advice and then followed that advice. It would be counterproductive and even oppressive were we to find that they can now be held liable in damages for their actions. This is not to say that officials can ignore clear constitutional rules and hide behind the advice of an attorney.

*Los Angeles Police Protective League v. Gates,* 907 F.2d 879, 888 (9th Cir. 1990) (citations omitted).

Not surprisingly, that approach has been applied when a warrant has been obtained. *KRL v. Estate of Moore,* 512 F.3d 1184, 1189-90 (9th Cir. 2008) (citations omitted). In other words, we are much inclined to protect officers when they seek the aid of the court before they act; that alone advances the purposes of the Fourth Amendment. *See Ortiz v. Van Auken,* 887 F.2d 1366, 1368-71 (9th Cir. 1989). In sum "[o]ur cases repeatedly emphasize [the] distinction between warrants with disputable probable cause and warrants so lacking in probable cause that no reasonable officer would view them as valid." *KRL,* 512 F.3d at 1190; *see also United States v. Stubbs,* 873 F.2d 210, 212 (9th Cir. 1989).

Here, as I see it, we are at the outer limits of our tolerance in that respect. When I read and reread the warrant and the affidavit that supports it, I come away with the feeling that there is extremely little support for the search of a third person's home for all firearms and ammunition. The weapon involved in the offense in question was identified with precision and the officers even had photographs of it. Similarly, although Bowen was, indeed, a bad man and a gang member, it is a little difficult to justify the search of a third person's home for gang membership information: gangs had nothing whatsoever to do with the domestic assault that is in question here. Of course, I recognize, that the officers did not know that they were searching a third person's home; they thought they were searching Bowen's home also.

In short, courts are concerned about the burdens imposed upon police officers in this kind of situation and are constrained to feel empathy for their plight. On the other hand, courts are concerned about the plight of decent citizens like the Millenders when governmental authorities smash their way into a home on a quest for information regarding a person who, as it turns out, does not even reside in the home. Thus, in order to reify our concern for the officers we must embrace the protections thrown up around them in the warrant area with enthusiasm rather than with velleity. However, we must also protect the sanctity of the home[1] and assure that no representative of state power simply hides behind the misdeeds or misdirections of other representatives, lest we become a kakistocracy.[2] On this record, the former concerns prevail.

I, thus, concur in the majority opinion. I do so with deep regret that with respect to the warrant the legal system failed the Millenders, but we cannot visit the cost of that failure upon the heads of the officers.

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[1] *See Los Angeles Police Protective League*, 907 F.2d at 884.

[2] *See Grossman v. City of Portland*, 33 F.3d 1200, 1209-10 (9th Cir. 1994).

IKUTA, Circuit Judge, dissenting:

Jerry Bowen is not a model citizen. He is allegedly a member of a street gang. He punched, bit, and then shot at his girlfriend when she understandably tried to leave him.

However, on October 10, 2003, Jerry Bowen's assault on Shelly Kelly was incontrovertibly not related to his gang activity. Moreover, Kelly had identified the weapon used in the crime: a black pump-gauge sawed-off shotgun with a pistol grip. Indeed, Kelly even gave the police a photograph of Bowen holding the shotgun.

Instead of seeking a warrant for the sawed-off shotgun, Officer Messerschmidt sought a warrant for:

> All handguns, rifles or shotguns of any caliber, or any firearms capable of firing ammunition or firearms or devices modified or designed to allow it to fire ammunition. All caliber of ammunition, miscellaneous gun parts, gun cleaning kits, holsters which could hold or have held any caliber handgun being sought. Any receipts or paperwork, showing the purchase, ownership, or possession of the handguns being sought. Any firearm for which there is no proof of ownership. Any firearm capable of firing or chambered to fire any caliber ammunition.
>
> Articles of evidence showing street gang membership or affiliation with any Street Gang to include but not limited to any reference to "Mona Park Crips," including writings or

> graffiti depicting gang membership, activity or identity. Articles of personal property tending to establish the identity of person in control of the premise or premises. Any photographs or photograph albums depicting persons, vehicles, weapons or locations, which may appear relevant to gang membership, or which may depict the item being sought and or believed to be evidence in the case being investigated on this warrant, or which may depict evidence of criminal activity. Additionally to include any gang indicia that would establish the persons being sought in this warrant, affiliation or membership with the "Mona Park Crips" street gang.

Two statements in Messerschmidt's affidavit provided the sole grounds for this extraordinarily broad warrant: (1) Bowen was "a known Mona Park Crip gang member" and (2) Messerschmidt "believe[d] that the items sought will be in the possession of Jerry Ray Bowen and the recovery of the weapon could be invaluable in the successful prosecution of the suspect involved in this case, and the curtailment of further crimes being committed."

Because neither of these statements provided a "substantial basis" for demonstrating "a fair probability that contraband or evidence of a crime will be found in a particular place," *Illinois v. Gates*, 462 U.S. 213, 238 (1983), no officer of reasonable competence could have thought this affidavit established probable cause to search for the items listed in the warrant, *see*

*Malley v. Briggs*, 475 U.S. 335, 341 (1986) (in determining whether an officer is eligible for qualified immunity, "[t]he question is whether a reasonably well-trained officer in petitioner's position would have known that his affidavit failed to establish probable cause and that he should not have applied for the warrant"). Therefore, I would affirm the district court's denial of qualified immunity, and I respectfully dissent.

I

Viewing the evidence in the light most favorable to the Millenders (as we must when reviewing this appeal from the denial of the officers' motion for summary judgment based on qualified immunity), no reasonably well-trained officer in Messerschmidt's position could have concluded that there was probable cause to search for the wide variety of firearms, firearm accessories, and gang paraphernalia listed in the search warrant.

Probable cause exists when an affidavit demonstrates a fair probability that each of the items sought in the search warrant is contraband or evidence of a crime. *See VonderAhe v. Howland*, 508 F.2d 364, 369 (9th Cir. 1974); *In re Grand Jury Subpoenas Dated Dec. 10, 1987*, 926 F.2d 847, 857 (9th Cir. 1991) (holding that "probable cause must exist to seize all the items of a particular type described in the warrant").

The affidavit must set forth specific facts that make the search reasonable. A warrant may not "rest upon mere affirmance of suspicion or belief without disclosure of supporting facts or circumstances." *Nathanson v. United States,* 290 U.S. 41, 47 (1933); *see also Gates,* 462 U.S. at 239 (citing *Nathanson* with approval and stating that a "bare-bones" affidavit comprised of mere conclusory statements is an inadequate basis for a probable cause determination); *Lee Art Theatre, Inc. v. Virginia,* 392 U.S. 636, 637 (1968) (holding that an affidavit that merely stated the officer's belief that movies and books to be seized were obscene, and therefore illegal, was insufficient to establish probable cause). Moreover, the search warrant must be "carefully tailored to its justifications" in order to ensure that the search "will not take on the character of the wide-ranging exploratory searches the Framers intended to prohibit." *Maryland v. Garrison,* 480 U.S. 79, 84 (1987).

II

The affidavit in this case did not allege facts making it reasonable to search for the broad array of firearms and firearm-related equipment listed in the search warrant. The affidavit established probable cause to search for a "black sawed off shotgun with a pistol grip" because it recounted Bowen's attack on Kelly with that weapon. But the affidavit did not recite any facts indicating that the broad array of other items sought (including "[a]ll handguns, rifles or shotguns of any caliber, or any firearms capable of

firing ammunition or firearms or devices modified or designed to allow it to fire ammunition") were used in, or were evidence of, the crime under investigation. *See United States v. Rubio,* 727 F.2d 786, 793 (9th Cir. 1983) (where a warrant seeks evidence relevant to proving a criminal violation, the affidavit must establish probable cause to believe there is a connection between the evidence sought and a violation of the criminal statute at issue).

The affidavit contains the conclusory statement that "the recovery of the weapon could be invaluable in the successful prosecution of the suspect involved in this case, and the curtailment of further crimes being committed." No reasonable officer could think this statement is enough to support probable cause. Mere possession of firearms is not, generally speaking, a crime, *cf. District of Columbia v. Heller,* 128 S. Ct. 2783, 2799 (2008), and a reasonable officer in Messerschmidt's position would know that the only weapon at issue in the case was the sawed-off shotgun depicted in the photograph and specifically described by Kelly, *see VonderAhe,* 508 F.2d at 370 (where "the government knew exactly what it needed and wanted" in search for particular type of record, a warrant seeking all types of records is prohibited).

Nor did the affidavit demonstrate a fair probability that the gang paraphernalia sought in the warrant was an instrumentality or evidence of the crime under investigation. The affidavit stated only that Bowen was "a known Mona Park Crip gang member." Gang paraphernalia may evidence membership in a

gang, but such membership is not itself evidence of a crime, absent an allegation that the gang is wholly criminal or that there is some nexus between Bowen's criminal activity and his membership in the gang. *See Rubio,* 727 F.2d at 793; *see also Warden v. Hayden,* 387 U.S. 294, 307 (1967). The affidavit does not include such allegations. Rather, the affidavit describes the crime as a "spousal assault," and states that Kelly had decided to end her dating relationship with Bowen due to his temper, and had called the officers "to watch over her while she gathered some of her property from her residence." Nothing in these statements demonstrates a fair probability that the gang paraphernalia described in the warrant was evidence of a crime, and no reasonable officer could think otherwise.

Finally, the officers here cannot shield themselves from liability by relying on the deputy district attorney's review or the magistrate's approval of the warrant. "Our cases repeatedly emphasize th[e] distinction between warrants with disputable probable cause," where reliance on magistrate approval is reasonable, "and warrants so lacking in probable cause that no reasonable officer would view them as valid," where reliance on magistrate approval is unavailing. *KRL v. Estate of Moore,* 512 F.3d 1184, 1190 (9th Cir. 2008). This case falls into the latter category. Messerschmidt's affidavit provided "a mere affirmation of suspicion and belief without any statement of adequate supporting facts." *Nathanson,* 290 U.S. at 46. In short, the affidavit is simply missing

the facts and circumstances that would support a search for the array of firearms and gang paraphernalia described in the warrant.

III

The majority reaches the contrary conclusion for several reasons. First, the majority relies on the allegations in the affidavit that Bowen used a deadly weapon and had ties with a gang. Second, the majority states that it is reasonable to infer that Bowen "probably had a criminal record," although the affidavit does not say so. Maj. Op. at 5273. Third, the majority notes that the warrant was limited to items that "arose out of the officer's particular concerns with Bowen, if not with the specific crime under investigation." Maj. Op. at 5274. In essence, the majority holds that the breadth of the warrant is justified because Bowen used a gun, was a member of a gang, and had raised the concerns of the police.

I disagree. Officers do not get a pass from complying with the Fourth Amendment's warrant requirements because they are investigating an unsavory character. No matter how shady Bowen may be, reasonable officers would know that they cannot undertake "general, exploratory searches and indiscriminate rummaging through a person's belongings," *United States v. Spilotro,* 800 F.2d 959, 963 (9th Cir. 1986), unless there are facts in the affidavit establishing a fair probability that the items sought in the search warrant are contraband or evidence of a crime.

## IV

In sum, the affidavit contained only conclusory statements rather than concrete facts and circumstances, and failed to allege a nexus between the items sought and the criminal activity being investigated. Because it did not include facts demonstrating a fair probability that the items listed in the search warrant were evidence of the crime being investigated, "a reasonably well-trained officer in petitioner's position would have known that his affidavit failed to establish probable cause and that he should not have applied for the warrant." *Malley*, 475 U.S. at 345. The officers "cannot excuse [their] own default by pointing to the greater incompetence of the magistrate." *Id.* at 346 n.9. I would affirm the district court's denial of qualified immunity, and I respectfully dissent.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

AUGUSTA MILLENDER, BRENDA MILLENDER, WILLIAM JOHNSON,

Plaintiffs,

v.

COUNTY OF LOS ANGELES, ET AL.,

Defendants.

Case No. CV 05-2298 DDP (RZx)

**ORDER (1) GRANTING IN PART AND DENYING IN PART PLAINTIFFS' NOTICE OF MOTION AND MOTION FOR SUMMARY ADJUDICATION; (2) GRANTING IN PART AND DENYING IN PART INDIVIDUAL DEFENDANTS' NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT AND/OR SUMMARY ADJUDICATION OF ISSUES; and (3) GRANTING IN PART AND DENYING IN PART MUNICIPAL DEFENDANTS' NOTICE OF MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, FOR SUMMARY ADJUDICATION OF ISSUES**

(Filed Mar. 15, 2007)

[Motions filed on September 18, 2006]

This matter comes before the Court on: (1) Plaintiffs' Notice of Motion and Motion for Summary Adjudication ("P's MSJ"); (2) Individual Defendants' Notice of Motion and Motion for Summary Judgment and/or Summary Adjudication of Issues ("ID's MSJ"); and (3) Municipal Defendants' Notice of Motion and Motion for Summary Judgment or, in the Alternative, for Summary Adjudication of Issues ("MD's MSJ"). After reviewing and considering the materials submitted by the parties and hearing oral argument, the Court adopts the following order.

## I. Background

On March 28, 2005, Augusta Millender, Brenda Millender and William Johnson (collectively referred to as "Plaintiffs") filed a Civil Rights Complaint with State Law Claims ("Compl.") against The County of Los Angeles, the Los Angeles County Sheriff's Department, and Sheriff Leroy Baca (collectively referred to as "Municipal Defendants"), and 27 Los Angeles County deputies[1] (collectively referred to as "Individual Defendants"). Specifically, Plaintiffs' complaint includes three causes of action under 42 U.S.C. § 1983 for violations of the Fourth and Fourteenth

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[1] While, at one time, there were 27 individual deputy Defendants, 16 of them have been terminated from the Complaint. Therefore, the following 11 Individual Defendants remain: Jack Demello, Robert J. Lawrence, Curt Messerschmidt, Donald Nichiporuk, David O'Sullivan, Rick Rector, James Ritenour, Richard Schlegel, Ian Stade, Brice Stella, and Scott Walker.

Amendments and for conspiracy to deprive them of their civil rights based on their race (including *Monell* claims against the County of Los Angeles and the Sheriff's Department, and supervisorial liability claims against Sheriff Baca in his official and individual capacities). The Complaint also includes supplemental claims for: violations of the California Constitution; violations of civil rights under *California Civil Code* §§ 52.1 & 51.7; negligence; and conspiracy. Plaintiffs allege the following in their Complaint.

Plaintiffs allege that the violations of their rights caused Plaintiffs special and general damages, physical injuries and extreme emotional distress including, but not limited to, fright, shock, embarrassment, anger and other emotional distress. (Complaint ¶ 22). Augusta Millender was hospitalized, and Brenda Millender and William Johnson moved. (*Id.*)

## II. Statement of Facts

Unless otherwise noted, the following facts are undisputed:

Augusta Millender ("Mrs. Millender") was 73 years old on November 6, 2003 and was being treated for diabetes and high blood pressure. (Plaintiffs' Statement of Uncontroverted Material Facts and Conclusions of Law ("P's SUF"), No. 1). She also had metal pins in her femur and used a walker. (*Id.*) On November 6, 2003, Mrs. Millender was living with her 47 year-old daughter, Brenda, who was being

treated for high blood pressure and insulin-dependent diabetes. (P's SUF No. 2). On November 6, 2003, Mrs. Millender's grandson, William Johnson, who was Brenda's son, was also living at the house with Mrs. Millender and Brenda. (P's SUF No. 3). He was 20 years old at the time. (*Id.*) The Millenders lived at 2234 East 120th Street in Los Angeles, California (the "120th Street Address" or the "Millender Residence"). (P's SUF No. 4).

In 1982, Mrs. Millender first met her foster son, Jerry Bowen, who was 13 years old. (P's SUF No. 5). He lived with her until he was about 19 years old, which would have been 1987 or 1989. (*Id.*) The next time Bowen stayed at Mrs. Millender's home was from January or February to March of 2003, when he stayed there only temporarily. (P's SUF No. 6; Individual Defendants' Statement of Material Uncontroverted Facts and Conclusions of Law ("ID's SUF") No. 10). When Bowen stayed at the house in 2003, he stayed in the back house, not in the main house. (P's SUF No. 7). Because, at that time, Bowen did not have a regular address, he received mail from the State of California and/or the County of Los Angeles at the 120th Street Address. (P's SUF No. 8; ID's SUF No. 10).

On October 17, 2003, while Shelly Kelly was moving out of her apartment at 1425 W. 97th Street in Los Angeles ("the 97th Street Address"), Bowen assaulted her. (P's SUF No. 11; ID's SUF No. 1). Due to Bowen's violent tendencies and some prior physical assaults on her, Kelly had called the Sheriff's

Department to stand by while she moved her belongings out of her apartment. (ID's SUF No. 2). Approximately twenty minutes after the deputies arrived, they were called away on an emergency of a child not breathing. (ID's SUF No. 3).

Kelly stated that, as soon as the deputies left the location, Bowen appeared and the altercation began. (*Id.*) Bowen bit Kelly and attempted to push her down the stairs. (ID's SUF No. 1). Kelly managed to get away from Bowen. (P's SUF No. 12). Bowen grabbed Kelly by the front of her shirt with both of his hands. (ID's SUF No. 3). He also grabbed Kelly by the hair and tried to pull her into the residence. (*Id.*) Kelly straddled the doorway with her legs to keep him from pulling her inside. (*Id.*) Bowen then grabbed both of her arms, at which time she was able to pull out of her shirt and run to her vehicle. (ID's SUF No. 4). Bowen went into the apartment and came back out with a sawed-off shotgun with a pistol grip. (*Id.*) He stood in front of Kelly's vehicle and told her he would kill her if she left. (*Id.*) Kelly laid down on her seat and "punched it." (*Id.*) As she drove away in her car, Bowen shot at her with the black sawed-off shotgun. (P's SUF NO. 12; ID's SUF Nos. 1 & 4). Kelly located police officers a short time later. (ID's SUF No. 4). When they later interviewed Kelly about the incident, deputies immediately recognized her and the location as the same individual and address they had left earlier. (ID's SUF No. 5). Kelly provided the deputies with four photographs of the suspect to aid them in their investigation. (*Id.*)

Curt Messerschmidt was the detective assigned to the case, and he eventually authored a search warrant affidavit. (P's SUF No. 14; ID's SUF No. 6). Before meeting with Kelly, Messerschmidt reviewed the incident report and a supplemental report prepared by Deputy Hector Garcia regarding the assault incident. (ID's SUF No. 6).

On October 22, 2003, Messerschmidt met with Kelly at the Lennox Sheriff's station, reviewed the incident report, and verified the facts of the incident with her. (ID's SUF Nos. 8 & 13). During her interview, Kelly told Messerschmidt that Bowen did not live at the 97th Street Address and was staying at the 120th Street Address. (*Id.*) She also told Messerschmidt that "if she wasn't mistaken," Bowen was "hiding out" at the Millender Residence, which was his foster mother's house. (P's SUF No. 15; ID's SUF No. 8). Messerschmidt did not ask and Kelly did not tell him why she believed this to be true. (P's SUF No. 16). Therefore, this information is not in Messerschmidt's warrant affidavit. (*Id.*) Although Kelly allegedly told Messerschmidt that she had been to the Millender Residence with Bowen prior to the assault, he did not document it. (P's SUF No. 18; Deposition of Curt Alan Messerschmidt, June 27, 2006 ("Messer. Depo."), attached as Exh. X to Declaration of Robert Mann in Support of Plaintiffs' Motion for Summary Adjudication ("Mann Decl."), at 51:23-52:9). However, Mrs. Millender testified that she saw Kelly at her house on at least two occasions. (ID's SUF No. 10). Kelly did not actually use the term

residence in telling Messerschmidt where she thought Bowen could be found. (P's SUF Nos. 19 and 20). Kelly was a drug dealer for 18 years, but had been clean for 8 years before the incident with Bowen. (P's SUF No. 22).

Messerschmidt took photographs of the bruises and bite mark on Kelly. (ID's SUF No. 13). Messerschmidt also reviewed the photographs that Kelly had given the deputies. (*Id.*) Kelly identified Bowen in a "six pack" line up after signing the "Witness Admonition Mug Show Ups" form. (ID's SUF No. 14). Bowen was a known Mona Park Crip gang member. (*Id.*)

Messerschmidt prepared a supplemental report of the interview with Kelly and began doing further research to verify if the 120th Street Address was a good address for Bowen. (ID's SUF No. 16). According to his affidavit, Messerschmidt searched "departmental records, state computer records and other police agency records" to verify Bowen's address. (P's SUF No. 23). The affidavit does not state with any further specificity what databases Messerschmidt searched or what the records revealed. (*Id.*) Messerschmidt states, however, that he searched DMV records, Cal-Gangs data entries, California criminal history records and the National Criminal Index Center. (ID's SUF No. 17). He also did a computer search to verify Bowen's name, address and date of birth. (ID's SUF No. 18). He checked the Consolidated Criminal History Reporting System ("CCHRS"), which indicated that Bowen was on summary probation for a spousal battery and an

unlicensed driver charge. (*Id.*) Messerschmidt checked Bowen's rap sheet/criminal history on the California Law Enforcement Teletype System ("CLETS"), which indicated Bowen's violent history and multiple felony and misdemeanor arrests. (ID's SUF No. 6).

Based upon the computer searches, the 97th Street Address was the most current, not the 120th Street Address. (P's SUF No. 24). The Department of Motor Vehicles records Messerschmidt searched indicated the most recent address for Bowen, as of September 3, 2003, was the 97th Street Address, not the 120th Street Address. (P's SUF No. 25). However, they also indicated that, as of March 27, 2003, Bowen's address was the 120th Street Address. (ID's SUF No. 18; P's SUF No. 26). Furthermore, Bowen went back to the 97th Street Address a week or two prior to the search warrant and verified that Bowen was not staying there. (ID's SUF No. 8).

The Gang Profile Records showed that, on May 17, 2003, Bowen verbally told Century deputies that his address was the 120th Street Address. (P's SUF No. 27; ID's SUF No. 18). According to a restraining order issued May 16, 2003, Bowen's address at that time was on Marvin Avenue. (P's SUF No. 28). The computer records Messerschmidt searched did not indicate Bowen's current residence address. (P's SUF No. 29).

In training, police officers are taught that the successful use of informants is critical in developing accurate information pertaining to a case. They are

taught that informants are information providers who could be a citizen victim, witness, paid informant or suspect charged with a crime. (ID's SUF No. 9). In this case, the informant was the victim, Kelly. (*Id.*)

After Messerschmidt interviewed everybody and did all the computer checks, he started gathering all his information and prepared his search warrant affidavit for the issuance of an arrest warrant for Bowen and a search warrant for the 120th Street Address. (ID's SUF No. 21). Messerschmidt requested a Ramey Warrant be issued for Bowen for his involvement in the assault. (*Id.*) The warrant affidavit was reviewed and approved by Sergeant Lawrence, Messerschmidt's team sergeant at Lennox Operation Safe Streets, and Lieutenant Ornales. (*Id.*) Deputy District Attorney Janet Wilson also reviewed and approved the warrant. (*Id.*)

On November 3, 2003, Messerschmidt consulted with Lieutenant Maxwell of the Sheriff's Department Special Enforcement Bureau ("SEB") SWAT Team. (*Id.*) As a result of that consultation, the SEB SWAT team's Blue Team, under team leader Sergeant Walker, was requested to assist with the warrant service at the 120th Street Address. (*Id.*; ID's SUF No. 27).

Messerschmidt applied for and obtained an arrest warrant for Bowen and a search warrant for the Millender residence on November 4. (P's SUF No. 37; ID's SUF No. 26). Messerschmidt sought, and the warrant authorized, night time service. (P's SUF No.

38; ID's SUF No. 23). The warrant authorized seizure of:

> All handguns, rifles, or shotguns of any caliber, or any firearms capable of firing ammunition, or firearms or devices modified or designed to allow it to fire ammunition. All caliber of ammunition, miscellaneous gun parts, gun cleaning kits, holsters which could hold or have held any caliber handgun being sought. Any receipts or paperwork showing the purchase, ownership, or possession of the handguns being sought. Any firearm for which there is no proof of ownership. Any firearm capable of firing or chambered to fire any caliber ammunition.

(Mann Decl., Exh. J). The warrant further authorized the seizure of "[a]rticles of evidence showing street gang membership or affiliation with any street gang to include but not limited to any reference to 'Mona Park Crips', including writings or graffiti depicting gang membership, activity or identity." (*Id.*) The warrant also authorized "[a]rticles of personal property tending to establish the identity of persons in control of the premise or premises." (Mann Decl., Exh J). The warrant authorized the seizure of any photographs which appeared relevant to gang membership, might depict the item being sought, or might depict any, undefined, criminal activity. (P's SUF No. 45; ID's SUF No. 25). Messerschmidt had no reason to believe Bowen's crime was a "gang" crime. (P's SUF No. 42). Defendants respond that evidence of gang affiliation is an enhancement to criminal charges.

Several days before the warrant service, the SEB SWAT personnel began the information and planning process based on the information given to them by Messerschmidt regarding the wanted suspect, warrant location, and date and time of service. (ID's SUF No. 34). The information was recorded on the SEB Activation Request – Preliminary Data Form. (*Id.*) The SEB SWAT personnel reviewed the search warrant, search warrant checklist, Bowen's criminal history, the operations plan from Messerschmidt's unit, and photographs. (*Id.*) Based on this, they developed a tactical plan. (*Id.*) Walker took Bowen's criminal history and active gang membership into consideration in formulating the plan for warrant service. (*Id.*) Walker reviewed the search warrant and supporting affidavit with his team before it was served to be sure that they knew what was included in the warrant, explained the plan and briefed everybody on their assigned role. (ID's SUF Nos. 29 & 34). After the search was completed, information regarding the tactical plan was filled out in the Team Activation Packet. (ID's SUF Nos. 30 & 34). The mission for SEB personnel was "to safely execute the search warrant, detain all the occupants on the property and secure the location for investigators." (*Id.*). Once that was accomplished, the investigators would continue their investigation. (*Id.*) The "Plans to Accomplish the Mission" section of the Team Activation Packet stated that:

> Once containment personnel are in place, the entry team will approach the front of the

> location on the armored rescue vehicle. The entry team, along with the front containment team will off load from the vehicle and approach the front door. Knock and notice announcements will be given via a pre-recorded taped announcement on a PA system as well as verbal announcements at the front door. If there is no acknowledgment at the door by the occupants, the team will breach the front door and make limited penetration into the house. In addition, the window near the front door will be ported so that we can provide cover for the breaching team as well as providing us the opportunity to prevent injury to occupants inside. If occupants are encountered, they will be directed towards us and lead outside to a safe area. Once the occupants are out, the team will clear the location and render it safe for the handling detectives.

(ID's SUF No. 31). The following SEB SWAT Team Blue Team personnel were assigned positions as follows: Entry Team – Walker, Rector, Nichiporuk, Schlegel, Stella, Demello, O'Sullivan and Ritenour; Containment Team – Wilber, Harris, Stade, Murray, Foisner, Bones, Geisler, Desmarteau, Parga, Hayes and Conti; Emergency medical personnel: Harrell and McCabe. (ID's SUF No. 32).

On November 4, 2003, two days before the service of the warrant, Walker drove by the Millender residence in an undercover vehicle in order to obtain photographs for the warrant service planning. (ID's SUF No. 35). He was accompanied by Deputies

Rector, Nichiporuk, Stella and Stade. (*Id.*) They took photographs and looked at the area in order to determine how they were going to serve the warrant. (*Id.*) They did not have contact with anyone from the residence on that date. (*Id.*)

On November 5, 2003, Walker, Stella, Rector and Nichiporuk drove around the area of the Millender Residence for an opportunity to arrest Bowen if they happened to see him. (P's SUF No. 31; ID's SUF No. 36). Deputies Stella and Walker contacted four to five male blacks who were shooting dice on the sidewalk directly in front of the Millender Residence. (ID's No. 36). Deputies Stella and Walker spoke with the males, a couple of whom matched Bowen's general description, while Deputies Rector and Nichiporuk walked down the Millender's driveway. (*Id.*) Stella and Walker determined that Bowen was not part of the group. (*Id.*) The deputies approached the house in broad daylight without their weapons drawn. (P's SUF No. 32). Deputies Rector and Nichiporuk spoke with Mrs. Millender and Brenda on their driveway. (P's SUF No. 33; ID's SUF No. 36). Walker saw an older woman who he now believes was Mrs. Millender speaking to them, but could not here [sic] what they were saying. (ID's SUF No. 36). Walker saw another female outside who he now believes was Brenda Millender. (*Id.*) Rector talked to either Mrs. Millender or Brenda Millender and asked her about the men in front of the house. (*Id.*) The woman said she did not know the men and did not give them permission to be there. (*Id.*) The SEB deputies who were at the

Millender Residence on November 5, 2003, the day before the search warrant execution, did not document what occurred there and did not tell Messerschmidt anything about it. (P's SUF No.34).

At approximately 5:00 a.m. on November 6, 2003, the SEB Blue Team served a high-risk search and arrest warrant at 2234 E. 120th Street. (P's SUF No. 47; ID's SUF No. 28). Messerschmidt and Detective Pickett were positioned in the middle of the street to the east of the location in order to stop traffic. (ID's SUF No. 28).

The residence was occupied by the Millender Family. (ID's SUF No. 28). Mrs. Millender, Brenda and William were asleep when the deputies arrived. (P's SUF No. 48). Defendants played a pre-recorded announcement over a PA system from a radio car parked in the street. (P's SUF No. 49; ID's SUF No. 39). When there was no response from the interior of the main house, Walker ordered O'Sullivan to "break and rake" the front window. (ID's SUF No. 40). Deputies also forced open the front security door. (*Id.*) As the team entered the house, they continued to identify themselves as law enforcement personnel and said that they had a search warrant. (ID's SUF No. 42). Rector, Nichiporuk and Walker were the first three through the door. (*Id.*) Upon entering the house, deputies encountered Mrs. Millender, Brenda and William, who all followed the deputies instructions and went outside to wait. (P's SUF No. 55; ID's SUF Nos. 42, 44 & 45).

The deputies proceeded to search and clear the house, which took approximately 20 minutes. (P's SUF No. 56; ID's SUF No. 49). Once the main house was cleared, the entry team went to the east side of the house and exited the kitchen, which led to the entrance of a large addition that was attached to the house but had its own outside entrance. (ID's SUF No. 49). Mrs. Millender's adult sons resided there. (P's SUF No. 57). Rector made the announcement for the people inside the addition to come out. (ID's SUF No. 49). The deputies did not forcibly enter the back house. (P's SUF No. 58). At the back house, the deputies waited for over a minute for the occupants to get dressed and come out, which all seven of them did without incident. (P's SUF No. 59; ID's SUF No. 49). None of the people in the addition are plaintiffs in this action. (ID's SUF No. 50).

Walker recorded on audio tape the entry on November 6, 2003. (ID's SUF No. 53). The SEB Team left the 120th Street Address after the warrant service somewhere past 5:45 in the morning. (ID's SUF No. 54). Walker did not handcuff anyone, or have any contact with any occupants after they were directed outside of the house. (ID's SUF No. 51). He did not participate in searching the house. (*Id.*)

When exiting the house, Brenda Millender told the deputy she did not want to step outside the house onto the porch, because she was a diabetic and there was glass on the ground. One of the officers took a rug from her mother's living room and threw it over the glass. (ID's SUF No. 46). The officer who escorted

her out helped her walk across the glass. (*Id.*) Mrs. Millender, Brenda and William waited outside until the house was secured, most of the time being allowed to sit inside patrol cars because they were cold. (P's SUF No. 62; ID's SUF Nos. 45 & 48). Brenda asked a deputy for a blanket, and he gave her one. (ID's SUF No. 47). While outside, Mrs. Millender told the deputies she needed to use the restroom. (P's SUF No. 63). Because the deputies would not allow her back into the house until the SWAT Team was done clearing and securing the location, Mrs. Millender relieved herself in the street. (*Id.*; ID's SUF No. 45). For at least some portion of time, William Johnson was handcuffed. (P's SUF No. 65). During the time that Brenda and Mrs. Millender were sitting in the police cars, Brenda did not complain that she had injuries, and Mrs. Millender never told the deputies that she had to go to the hospital. (ID's SUF No. 56).

After the location was secured, the deputies brought Mrs. Millender, Brenda and William into the living room while they completed the search of the house. (P's SUF No. 64; ID's SUF No. 55). Brenda was allowed to go to the restroom and to go to her room to get some shoes and a blanket. (ID's SUF No. 55). Lawrence watched the occupants in the living room. (ID's SUF No. 57). He did not apply handcuffs to anyone, or arrest anyone, and did not point his weapon at anyone. (*Id.*) Stade was assigned to containment outside the east side of [sic] house. (ID's SUF No. 57). He did not apply handcuffs to anyone, arrest anyone, or participate in the search of the residence. (*Id.*)

Faulkner, Ortega, Pickett, Valento, Cale and Bercini searched the house. (ID's SUF No. 59). When the search was over, Messerschmidt gathered the pieces of evidence being seized, had the property receipt signed and left. (ID's SUF No. 59). The deputies seized Mrs. Millender's personal shotgun, a State of California Social Services letter addressed to Bowen, and .45 caliber "American Eagle" ammunition. (P's SUF No. 66; ID's SUF No. 60).

Bowen was not found at the location. (P's SUF No. 60). Bowen's black, sawed-off shotgun was not found at the location. (P's SUF No. 61). On November 19, 2003, after the search of the Millender Residence, Messerschmidt, without SWAT assistance, arrested Bowen in the middle of the day. (P's SUF No. 36). He was hiding under a bed in a motel room occupied by Bowen and his wife, after knocking and being admitted by Bowen's wife. (*Id.*)

One of the occupants of the back house was Mrs. Millender's son, Willie Millender, who was arrested for being under the influence. (P's SUF No. 67). Criminal charges were filed against Willie Millender in *People v. Millender,* Case No. 3CM09209 in the California Superior Court of the South Central Judicial District of the County of Los Angeles. (P's SUF No. 68). Mr. Millender, represented by a public defender, made a motion to suppress based upon lack of probable cause in Messerschmidt's warrant affidavit. (P's SUF No. 69). The court granted Mr. Millender's motion to quash the warrant on the grounds that the affidavit did not establish probable cause to believe

Bowen would be found at Plaintiffs' home. (P's SUF No. 70). The case was dismissed and not refiled. (*Id.*). Detective Messerschmidt was the investigator on the case. (P's SUF No. 71). Messerschmidt testified under oath in the hearing on Mr. Millender's motion to suppress. (P's SUF No. 72). The hearing transcript is 80 pages and includes direct and redirect examination of the People's witness, Messerschmidt, as well as cross examination of both Mrs. Millender and Brenda, and a closing argument. (P's SUF No. 74).

Sheriff Leroy Baca was sued in his official capacity. (Municipal Defendants Statement of Uncontroverted Facts and Contentions of Law ("MD's SUF") No. 5). Plaintiffs' complaint does not involve allegations of interference with Plaintiffs' rights "to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property." (MD's SUF No. 6). Plaintiffs' complaint does not involve allegations of interference with Plaintiffs' rights "to inherit, purchase, lease, sell, hold, and convey real and personal property." (MD's SUF No. 8). Plaintiffs allege that "wrongs" were done to them on or about November 4, 2003 or November 6, 2003. (MD's SUF No. 15).

Plaintiffs' Count Six names only the County of Los Angeles as a defendant. (MD's SUF No. 23). Plaintiffs' Count Seven names only the County of Los Angeles as a defendant. (MD's SUF No. 26).

The deputies of the Los Angeles County Sheriff's Department received extensive training prior to and during their tenure in compliance with the established standards for California peace officer training (P.O.S.T. standards). (MD's SUF No. 28).

## III. Legal Standard on a Motion for Summary Judgment

Under the Federal Rules of Civil Procedure 56(c), summary judgment is proper only where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56. The moving party has the burden of demonstrating the absence of a genuine issue of fact for trial. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986). If the moving party satisfies the burden, the party opposing the motion must set forth specific facts showing that there remains a genuine issue for trial. *See id.*; Fed. R. Civ. P. 56 (e).

A non-moving party who bears the burden of proof at trial to an element essential to its case must make a showing sufficient to establish a genuine dispute of fact with respect to the existence of that element of the case or be subject to summary judgment. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Such an issue of fact is a genuine issue if it reasonably can be resolved in favor of either party.

*See Anderson,* 477 U.S. at 250-51. The non-movant's burden to demonstrate a genuine issue of material fact increases when the factual context renders her claim implausible. *See Matsushita Electrical Industrial Co. v. Zenith Radio Corp.,* 475 U.S. 574, 587, 106 S. Ct. 1348, 1356 (1986). Thus, mere disagreement of the bald assertion that a genuine issue of material fact exists, no longer precludes the use of summary judgment. *See Harper v. Wallingform,* 877 F.2d 728 (9th Cir. 1989); *California Architectural Building Products, Inc. v. Franciscan Ceramics, Inc.,* 818 F.2d 1466, 1468 (9th Cir. 1987), *cert. denied,* 484 U.S. 1006 (1988).

If the moving party seeks summary judgment on a claim or defense on which it bears the burden of proof at trial, it must satisfy its burden by showing affirmative, admissible evidence. Unauthenticated documents cannot be considered on a motion for summary judgment. *See Hal Roach Studios v. Richard Feiner and Co.,* 896 F.2d 1542, 1550 (9th Cir. 1987); *Canada v. Blain's Helicopters, Inc.,* 831 F.2d 920, 925 (9th Cir.1987). A document is authenticated when it is [sic] has the proper foundation. *Canada,* 831 F.2d at 925; *Hamilton v. Keystone Tankship Corp.,* 539 F.2d 684, 686 (9th Cir.1976); *United States v. Dibble,* 429 F.2d 598, 601-02 (9th Cir.1970).

On a motion for summary judgment, admissible declarations or affidavits must be based on personal knowledge, must set forth facts that would be admissible evidence at trial, and must show that the declarant or affiant is competent to testify as to the

facts at issue. *See* Fed. R. Civ. P. 56(e). Declarations on "information and belief" are inappropriate to demonstrate a genuine issue of fact. *See Taylor v. List,* 880 F.2d 1040, 1045 (9th Cir. 1989).

## IV. Discussion

### A. Failure to Meet and Confer

Before discussing the merits of the Parties' cross-motions for summary judgment, the Court notes that Plaintiffs argue that Municipal Defendants' Motion must be denied in its entirety, because Defendants failed to meet and confer regarding the issues included in the Motion.[2] Central District Local Rule 7-3, ("Local Rule 7-3"), provides, in relevant part, that "counsel contemplating the filing of any motion shall first contact opposing counsel to discuss thoroughly, *preferably in person*, the substance of the contemplated motion and any potential resolution. Local Rule 7-3.

In support of their argument that Defendants failed to meet and confer regarding Municipal Defendants' Motion, Plaintiffs note that defense counsel, Trevor Grimm, sent two letters to Plaintiffs' counsel.

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[2] The specific issues in Municipal Defendants' Motion are: (1) *Monell* liability; (2) Plaintiffs' various conspiracy theories; (3) that Sheriff Baca is not a proper Defendant; (4) racial discrimination; (5) claims for damages under the California Constitution; and (6) County's alleged immunity for negligent employment and immunity under the Eleventh Amendment. (Plaintiffs' Opposition to the County Defendants' Motion for Summary Judgment ("Plaintiff's Opp."), 1:9-12).

The first letter, dated July 10, 2006, listed several grounds for Defendants' proposed motion for summary judgment, including: (1) Deputy Messerschmidt made a reasonable investigation, which gave him probable cause to believe that Bowen would be at the Millender residence; (2) the search of databases for Bowen's criminal history was a reasonable and reliable step to determine Bowen's residence; (3) Messerschmidt investigated the fact that one of the documents searched suggested that Bowen resided at the 97th Street address (Kelly's apartment); (4) the fact that a state criminal court judge denied the validity of the warrant for other purposes, is not dispositive of the validity of the warrant for purposes of searching for Bowen; (5) the warrant execution was carried out in a reasonable manner; (6) there need only have been a "fair probability" that Bowen and the items to be seized were at the Millender residence; and (7) the length of time between the knock/notice and entry was reasonable. (Declaration of Donald W. Cook in Support of Plaintiffs' Opposition to Defendants' Motions for Summary Adjudication ("Cook Decl."), Exh. JJ at 49-51).

The second letter, dated August 29, 2006, repeated the first letter verbatim, but added the issue of qualified immunity for the Individual Defendants based upon their reliance on the warrant. (Cook Decl. Exh. JJ at 52-54). Thus, Plaintiffs contend that, because none of the issues in the Municipal Defendants' Motion were addressed by Defendants at any time,

Plaintiffs did not have sufficient opportunity to prepare to oppose these issues.

According to Grimm, he discussed the lack of municipal liability with Plaintiffs' counsel at the same time that Plaintiffs' counsel discussed their theories as to why there is municipal liability. (Declaration of L. Trevor Grimm in Support of Defendants Reply ("Grimm Decl."), ¶ 14). Grimm also contends in his Reply that, at the very least, these issues were discussed in detail in the context of meeting and conferring regarding Plaintiffs' Motion for Summary Judgment. (MD's Reply at 2:22-3:7).

Furthermore, as Defendants point out, Defense counsel's July 10, 2006 meet and confer correspondence advised Plaintiffs that Defendants intended to "file a motion for summary judgment for an order adjudicating this case summarily in *all* defendants' favor." (Cook Decl., Exh. JJ at 49). The reasons listed in such letter go to Municipal Defendants' liability as well as the liability of Individual Defendants. (*Id.* at 49-51). Therefore, the court declines to deny Municipal Defendants' Motion for Summary Judgment on the basis of Local Rule 7-3. This Court does remind the Parties, however, that it expects full compliance with Local Rule 7-3.

### B. Probable Cause to Establish that Bowen Could be Found at the Millender Residence

Plaintiffs move for summary adjudication on their claim that the affidavit did not establish probable cause to believe that Bowen could be found at the Millender Residence.

#### 1. Collateral Estoppel

As an initial matter, Plaintiffs point out that, in *People v. Millender,* Case No. 3CM09290, the Los Angeles Superior Court quashed the warrant to search the Millender Residence, because the affidavit did not establish probable cause to believe Bowen would be found there. (Mann Decl., Exh. T at 75:6-77:14). In particular, Judge Johnson found that there was insufficient probable cause, because the affidavit referred only to the search of generic records (i.e., departmental records, state computer records and police agency records), rather than pointing to the specific records searched. (*Id.*) Because the only thing left in the affidavit was Kelly's statement, which he determined was not enough, Judge Johnson granted Defendant's motion to quash the warrant.[3] (*Id.* at

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[3] It should be noted that, at the same hearing, Judge Johnson also (1) denied Willie Millender's motion to traverse (ruling that the information supposedly left out of the affidavit would not have made a difference); and (2) denied Willie Millender's motion that the entry team violated the knock notice rules. (Mann Decl., Exh. T at 74:13-75:5).

76:2-77:6). As a result of the ruling, the People were unable to proceed, and the court granted defendant Willie Millender's motion to dismiss. (*Id.* at 77:8-14). Plaintiffs indicate in their current Motion, and Defendants do not dispute, that no appeal was taken and there have been no further proceedings. (P's MSJ at 9:3). Therefore, Plaintiffs contend that Defendants are collaterally estopped from re-litigating the affidavit's sufficiency in the current Action.

The Full Faith and Credit Clause of the United States Constitution requires that federal courts "must give to a state-court judgment the same preclusive effect as would be given that judgment under the law of the State in which the judgment was rendered." *Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 80 (1984). Under California law, collateral estoppel applies if: "(1) the issue necessarily decided at the previous [proceeding] is identical to the one which is sought to be relitigated; (2) the previous [proceeding] resulted in a final judgment on the merits; and (3) the party against whom collateral estoppel is asserted was a party or in privity with a party at the prior [proceeding]." *Lombardi v. City of El Cajon,* 117 F.3d 1117, 1121 (9th Cir. 1997) (citing *People v. Sims,* 32 Cal. 3d 468, 484, 186 Cal. Rptr. 77, 87, 1651 P.2d 321 (1982)). Plaintiffs argue that "[since there was a final judgment as to one relevant, identical issue, the only question is privity." (P's MSJ at 9:15-16). The Court disagrees.

Even though the Parties do not raise the question of the "finality" of the state court's decision, the Ninth

Circuit has previously held that "suppression rulings under Cal. Penal Code § 1538.5, if not followed by a conviction or an acquittal, are not final judgments under California law and therefore are without collateral estoppel effect in a subsequent civil suit."[4] *Lombardi,* 117 F.3d at 1121 (citing *Heath v. Cast,* 813 F.2d 254, 258 (9th Cir. 1987). Here, as in *Lombardi,* the criminal case against Willie Millender was dismissed before it was decided on the merits. Therefore, Willie Millender was not convicted or acquitted, and there was no final judgment for collateral estoppel purposes. Because, there was no final judgment, this Court need not address the other elements of collateral estoppel.

Defendants are not precluded from relitigating the sufficiency of the affidavit in this Court. Accordingly, Plaintiffs' Motion to this effect is denied.

### 2. Sufficiency of the Affidavit

Plaintiffs next argue that, if collateral estoppel does not preclude Defendants from re-litigating the issue, this Court must find that, as a matter of law, the affidavit did not establish probable cause. Defendants similarly move for summary adjudication

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[4] California Penal Code § 1538.5, which covers motions to suppress evidence, includes both motions to quash, Cal. Penal Code § 1538.5(a)(1)(B)(I), and motions to traverse, Cal. Penal Code § 1538.5(a)(1)(B)(iii).

on the issue of whether the affidavit was sufficient to establish probable cause.

Plaintiffs first contend that, on its face, the affidavit did not establish probable cause to believe Bowen would be found at the Millender Residence. Second, Plaintiffs argue that the affidavit contained misrepresentations and that Messerschmidt omitted relevant facts, and that, therefore, Messerschmidt misled the issuing magistrate.

### a. Facial Challenge

It is undisputed that the "statement of probable cause" in the affidavit prepared and submitted by Detective Messerschmidt contained the following information relevant to the determination of Bowen's whereabouts: (1) Kelly, the victim of the physical assault allegedly perpetrated by Bowen, is Bowen's former girlfriend and identified him immediately in a "six pack" photo line up; (2) Kelly provided Messerschmidt with a current address of the suspect's residence – the 120th Street Address; (3) Kelly stated that she had been told by her neighbors that the suspect had been seen coming back to the 1425 W. 97th Street Address, where the assault occurred; (4) the affiant, Messerschmidt, conducted an extensive background search on Bowen by utilizing departmental records, state computer records, and other police agency records; and (5) based on the extensive search and information provided by the victim, Messerschmidt determined that Bowen resides at

2234 E. 120th Street in Los Angeles. (Mann Decl. Exh. J). Plaintiffs contend that, as a matter of law, this information was not enough to establish probable cause, while Defendants make the opposite argument.

*Illinois v. Gates* sets forth the appropriate standard for determining whether an affidavit provides sufficient probable cause to justify a search warrant. 462 U.S. 213 (1983). In *Gates,* the United States Supreme Court applied a "totality-of-the-circumstances" analysis and held that:

> [t]he task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of the reviewing court is simply to ensure that the magistrate had a 'substantial basis for conclud[ing]' that probable cause existed.

*Id.* at 238-39. The *Gates* Court further stated that "[s]ufficient information must be presented to the magistrate to allow that official to determine probable cause" and that "his action cannot be a mere ratification of the bare conclusions of others." *Id.* at 239.

The *Gates* Court made clear that the probable cause standard is a "practical, nontechnical conception"

that deals with probabilities rather than hard certainties. *Id.* at 231. "Veracity" or "reliability" and "basis of knowledge" should be understood as "relevant considerations in the totality-of-the-circumstances analysis" such that "a deficiency in one may be compensated for, in determining the overall reliability of a tip, by a strong showing as to the other, or by some other indicia of reliability." *Id.* at 233. In *Gates*, the Court also "recognized the value of corroboration of details of an informant's tip by independent police work," noting that "an officer may rely upon information received through an informant, rather than upon his direct observations, so long as the informant's statement is reasonably corroborated by other matters within the officer's knowledge." *Id.* at 242 (citations omitted). Finally, the Court emphasized the importance of deferring to the magistrate's decision regarding probable cause, stating that "we have repeatedly said that after-the-fact scrutiny by courts of the sufficiency of an affidavit should not take the form of *de novo* review," that a "magistrate's determination of probable cause should be paid great deference by reviewing courts," and that "courts should not invalidate warrants by interpreting affidavits in a hypertechnical, rather than a commonsense, manner." *Id.* at 236.

Plaintiffs argue that the affidavit did not provide probable cause for a warrant, because (1) Messerschmidt's reference to unidentified police records was inadequate in that it did not name the specific records searched and told the magistrate

nothing; and (2) Kelly's claim of residence had virtually no value, since the affidavit stated nothing about her "basis of knowledge." Defendants, on the other hand, contend that the same information did, as required by *Gates,* support a "fair probability" that Bowen would be found at the Millender Residence. Additionally, Defendants state that: (1) the computer records searched included Department of Motor Vehicles ("DMV") and Cal Gangs records; (2) Kelly told Messerschmidt that Bowen was not staying with her at the 97th Street Address and was staying with his foster mother at the 120th Street Address, and that she had been to the Millender Residence with Bowen prior to the assault; and (3) Messerschmidt went to the 97th Street Address a week or two prior to the search and verified that Bowen was not staying there. While this information is certainly relevant, Plaintiffs are correct that "[i]n reviewing the validity of a search warrant, a court is limited to the information and circumstances contained within the four corners of the underlying affidavit." *United States v. Stanert,* 762 F.2d 775, 778 (9th Cir. 1985).

Considering only the information specifically included in the affidavit, this Court finds that the question of whether such affidavit supported a finding of probable cause is a very close one. Plaintiffs are correct that it would not have been difficult for Messerschmidt to question Kelly as to her exact basis of knowledge on Bowen's whereabouts and to include that information in the affidavit. Such information, if reliable, would have bolstered the affidavit. That

being said, this Court also feels that, considering Kelly's relationship to Bowen, the magistrate could have reasonably determined that her statement was reliable. Furthermore, the magistrate could reasonably have determined that Messerschmidt's statement that he had "conducted an extensive background search on the suspect by utilizing departmental records, state computer records, and other police agency records" provided adequate police corroboration. This Court disagrees with Plaintiffs that Messerschmidt's failure to specify the exact records searched renders the affidavit invalid on its face. Had the magistrate felt it necessary to know this information, he could simply have said so. Therefore, keeping in mind the statements of the *Gates* Court regarding deference to the issuing magistrate, this Court finds that the warrant was, as a matter of law, facially valid.

**b. Judicial Deception**

Plaintiffs next argue that, even if the affidavit was valid on its face, it is in fact, invalid because it was based on misrepresentations, in that it includes false statements and/or fails to include relevant facts. Plaintiffs contend, therefore, that Messerschmidt misled the magistrate and that, in its corrected form, the affidavit does not establish probable cause.[5]

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[5] Plaintiffs also contend that, under California law, the "corrected form" of the affidavit need not even be considered

(Continued on following page)

Defendants, on the other hand, contend that Messerschmidt did not mislead the magistrate.

In support of their contention that Messerschmidt misled the issuing magistrate, Plaintiffs argue that "Messerschmidt misrepresented what Kelly said" and that "Messerschmidt misrepresented the information in police records." (Plaintiffs' MSJ at 16:13-17:5). Plaintiffs rely on law addressing both misrepresentations and omissions.

The first misrepresentation of fact to which Plaintiffs point is Messerschmidt's statement that Kelly provided him with "a current address of the suspect *residence.*" (Mann Decl. Exh. J) (emphasis added). Specifically, during her interview with Messerschmidt, Kelly did not use the word "reside" or "residence." (Videotape of Messerschmidt's October 22, 2003 Interview with Shelly Kelly, attached as Exh. C to the Mann Decl.). Rather, she simply said that Bowen was "staying at" or "hiding out at" the 120th Street Address. (*Id.*) Plaintiffs contend that a lay person cannot reliably opine as to what constitutes a residence, that even judges sometimes disagree on this question, and that Bowen did not "reside" with the Millenders. The Parties do not dispute the fact that, in the videotaped interview,

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because Messerschmidt made knowing/intentional misrepresentations.

Kelly did not actually use the word "reside"[6] (*Id.*) Thus, the question is whether Messerschmidt's use of the word "reside" was a misrepresentation that misled the magistrate.

Additionally, Plaintiffs argue that Messerschmidt misled the magistrate because (1) He did not include in the affidavit that, when asked during the videotaped interview if Bowen was staying at the 120th Street Address, Kelly responded "I believe so, if I'm not mistaken. I believe that's where he is hiding out at." (Mann Decl. Exh. C); and (2) Messerschmidt unequivocally represented that police records showed that the 120th Street Address was Bowen's "residence," rather than including that Bowen's most recent address was the 97th Street Address, that such records last associated Bowen with the 120th Street Address in May, and that the records also showed that Bowen was using a Marvin Avenue address in May.

It is undisputed that the DMV records Messerschmidt searched indicated that Bowen's most recent address, as of September 3, 2003, was the 97th Street Address where the assault occurred, and that his next most recent address was the 120th Street

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[6] Defendants have objected to Plaintiffs' submission of a transcript of the videotaped interview, which they created themselves on the grounds that the videotape itself is the best evidence. The Court notes that it does not rely on the transcript for any determinations made in this Order. Rather, the Court relies on the videotape itself, which both Parties submitted.

Address (March 27, 2003). (Mann Decl. Exh. G at 52; Messerschmidt Decl. Exh. F). It is also undisputed that, according to Bowen's "Gang Member Subject File Report" in the Cal Gangs records, Bowen verbally told Century deputies on May 17, 2003, that his address was the 120th Street Address. (Mann Decl. Exh. G at 50; Messerschmidt Decl. Exh. G at 61). Similarly, Bowen's Consolidated Criminal History Reporting System ("CCHRS") record indicated that the Millender Residence was his address as of May 17, 2003. (Mann Decl. Exh. G at 64). Finally, Messerschmidt also checked the County Warrant System and found documentation of a restraining order issued on May 16, 2003. That printout indicated an address of 2303 South Marvin Avenue. (Mann Decl. Exh. G at 44; Messerschmidt Depo. at 62:16-63:11). None of this information was included in the affidavit. Thus, Plaintiffs ask this Court to find that the affidavit did not establish probable cause that Bowen could be found at the Millender Residence, and the search was, therefore, unreasonable in violation of the Fourth Amendment to the United States Constitution and California Constitution Article I, section 13.

### (1) *The Federal Standard*

As discussed above, Plaintiffs argue that Messerschmidt submitted false and misleading information in, and/or omitted relevant information from, his affidavit to the magistrate, who then relied

upon that information, or lack thereof, in finding probable cause for the search warrant. To prove such a claim under federal law, Plaintiffs "must make (1) a substantial showing of deliberate falsehood or reckless disregard for the truth, and (2) establish that but for the dishonesty, the challenged action would not have occurred." *Butler v. Elle,* 281 F.3d 1014, 1024 (9th Cir. 2002).

"In this variety of Fourth Amendment case, alleging judicial deception in the procurement of a search warrant, we confront a situation where . . . a state-of-mind question is embedded in the underlying constitutional issue, i.e., whether or not in allegedly omitting relevant information from his affidavit in support of the application for a search warrant," Messerschmidt acted "with deliberate falsehood or reckless disregard for the truth." *Id.* The question of "state of mind" is one of fact, while the question of materiality, whether the warrant would have in fact been issued in light of these false statements and/or omissions, is one of law for the court. *Id.* at 1025-26.

*False Statements and/or Omissions*

The first question that this Court must answer is whether there were, in fact, misrepresentations and/or omissions. Plaintiffs first argue that Messerschmidt made a misrepresentation by using the word "reside" or "residence" in the affidavit. Plaintiffs acknowledge that the legal definition of residency may be complicated, but argue that the

basic concept is not. In support of their position, Plaintiffs point to the standard dictionary definitions of "reside" and "resident." Plaintiffs' focus on the technical definition of these words is a red herring. While Kelly may not actually have used the word "reside," she confirmed that Bowen was "staying at" or "at" the 120th Street Address. At one point in particular during the interview, Kelly confirmed without hesitation, after explaining that Bowen did not live at the 97th Street Address, that he was at the 120th Street Address – his foster mother's house. (Mann Decl. Exh. C). Considering all of the undisputed evidence in the light most favorable to Plaintiffs, the Court finds that the terms "reside" and "residence" are sufficiently ambiguous such that Messerschmidt's use of them does not, as a matter of law, amount to a false statement or a misrepresentation.[7]

The remainder of the misrepresentations and/or omissions of which Plaintiffs complain relate to the fact that Messerschmidt failed to include certain information in the affidavit. For instance, Plaintiffs point to the undisputed fact that Messerschmidt did not include the actual words that Kelly used – "staying at," "if I'm not mistaken," and "hiding out at." Similarly, Plaintiffs contend that Messerschmidt

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[7] Even if this did amount to a false statement, the Court agrees with Defendants that Messerschmidt's use of the word "reside" rather than "staying at" was reasonable, because both clearly indicate the place where Bowen could be found.

misled the magistrate by not including in the affidavit the undisputed fact that his computer searches revealed, in addition to the 120th Street Address, more recent and alternative addresses for Bowen. Plaintiffs' argument is, in essence, that Messerschmidt misled the magistrate by making unqualified statements without representing all the facts. Therefore, these "misrepresentations" are more properly characterized as omissions than false statements. It is undisputed that Messerschmidt had this information and did not include it in the affidavit. Therefore, these were omissions as a matter of law.

*State of Mind*

Next, because the Court has found that there were omissions, it must address the question of whether Messerschmidt acted with "deliberate falsehood" or "reckless disregard for the truth." If he did not act dishonestly or recklessly, then Messerschmidt's actions were reasonable, and there was no constitutional violation. *See Butler,* 281 F.3d at 1024. It appears that Plaintiffs' arguments regarding Messerschmidt's state of mind are that he had a duty to investigate further and that he knew, but failed to include, all of these facts. Thus, Plaintiffs infer that, because Messerschmidt knew the facts and did not include them and because he could have easily investigated further, but did not, Messerschmidt must have acted with "deliberate falsehood or reckless disregard for the truth." This is not enough to

establish or make a "substantial showing" as to Messerschmidt's state of mind.

In support of their Motion, Defendants submit evidence that Messerschmidt reasonably excluded the information that his computer search revealed the 97th Street Address as Bowen's most recent address, because Kelly had told him, and he had verified, that Bowen was not living there. (Messerschmidt Decl. ¶¶ 12 & 22). Defendants further argue, as discussed earlier, that Messerschmidt's use of the word "reside" rather than "staying at" or "hiding out at" was reasonable, because both clearly indicate the place where Bowen could be found.

The ultimate issue here is Messerschmidt's failure to qualify his statements with information that Kelly may have been something less than 100 percent certain as to Bowen's whereabouts and that his computer searches revealed other addresses in addition to the 120th Street Address. The Court reviewed the videotaped testimony of Shelly Kelly three times before it heard the words "if I'm not mistaken." Therefore, it is quite possible that Messerschmidt did not even hear Kelly say this. Significantly, earlier in the interview, Kelly had indicated unequivocally and without hesitation, that Bowen was at the 120th Street Address. (Mann Decl. Exh. C). Additionally, Kelly had been Bowen's girlfriend for approximately six months at the time of the interview and, as a result, was in a position to have this information about him. The 120th Street Address was that of Bowen's foster mother, someone with

whom he presumably had a very close relationship. Therefore, it was a logical place for Bowen to be staying, and was the most recent address for Bowen other than the 97th Street Address, where Messerschmidt knew Bowen was not staying. Finally, at least one of the computer records searched indicated that, less than six months earlier, Bowen had, himself, reported the Millender Residence as his address.

Considering all of this undisputed evidence in the light most favorable to Plaintiffs, this Court finds that Messerschmidt acted reasonably as a matter of law. Because Messerschmidt's conduct was reasonable, it did not violate Plaintiffs' constitutional rights as a matter of law, and it is unnecessary to reach the question of materiality. Thus, as to Plaintiffs' federal claims for violation of 42 U.S.C. § 1983, the Court finds that, while there were omissions, Messerschmidt acted reasonably as a matter of law in making such omissions, such that there was no constitutional violation. Accordingly, Plaintiffs' Motion as it relates to this issue is denied and Defendants' is granted.

### (2) *State Standard*

Plaintiffs argue that the same misstatements and/or omissions discussed above also violate their right to be free from unreasonable searches and

seizures under the California Constitution.[8] While the facts discussed above apply equally to this claim, the law under California state law is somewhat different. Furthermore, as the Parties' point out, the law varies slightly depending on whether we are discussing misstatements or omissions. In the case of misstatements, *People v. Cook*, 22 Cal. 3d 67, 583 P.2d 130 (1978) provides the appropriate standard, while in the case of omissions, *People v. Kurland*, 28 Cal. 3d 376, 618 P.2d 213 (1980) governs. The Court has already determined that there were no false statements in the affidavit. Therefore, the Court must only apply the law as it applies to omissions.

The *Kurland* court recognized that misstatements and omissions may not be treated in an identical manner, because "[i]ntentional omissions, unlike

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[8] It should be noted that Plaintiffs do not assert claims for violation of the California Constitution against any of the Individual Defendants. Rather, Plaintiffs name only the County of Los Angeles as a Defendant in the following claims for violation of state law: (1) Count Four – Violation of California Constitution, Article I, §§ 1,7, and 13; (2) Count Five – Violation of Civil Code Section 52.1(b); (3) Count Six – Violation of Civil Code Section 51.7; and (4) Count Seven – Negligence (Civil Code § 1714).

Therefore, this analysis under state law is only relevant to the extent that the question of whether Individual Defendants' violated Plaintiffs' constitutional rights ultimately bears on the question of whether the County is liable under *respondeat superior*. Furthermore, to the extent Plaintiffs do attempt to allege state-law claims against the Individual Defendants, they are precluded from doing so by the allegations of their Complaint.

the intentional misstatements considered in *Cook*, are not necessarily an effort to mislead the magistrate." *Id.* at 387. Rather, "[t]hey may arise from a correct, or at least reasonable, conclusion that the omitted facts were immaterial or privileged." *Id.* *Kurland* sets forth a two-step process. First, the reviewing court must determine whether any omissions asserted are material, i.e., whether "their omission would make the affidavit substantially misleading." *Id.* at 385, 387. Second, "[i]f an omission is found material, the [fact-finder] must [] determine . . . whether it arose innocently or from culpable conduct." *Id.* at 387. Specifically, it must be determined "whether the material omission was either (1) reasonable, (2) negligent, or (3) recklessly inaccurate or intentionally misleading." *Id.* at 387-88. Furthermore, that "the omission itself was 'intentional' rather than inadvertent may be relevant to those issues, but may not alone be dispositive." *Id.* at 388.

Pursuant to *Kurland*, "[a] material omission is reasonable when despite the exercise of due care, [the] affiant was ignorant of the omitted fact or forgot to include it, or his conclusion that it was privileged or immaterial was reasonable even if incorrect." *Id.* Where the material omissions are determined to be reasonable, regardless of whether they were volitional or inadvertent, there is no sanction and the warrant should be left in its original form. *Id.* "Negligent omissions, on the other hand, occur when the affiant is unreasonably ignorant of facts,

unreasonably forgets to include them, or makes a good faith but unreasonable decision that they need not or should not be included." *Id.* In such a case, the omissions should be added to the affidavit and it should be retested for probable cause. *Id.* Finally, if an "affiant intentionally omits any fact for the purpose of deceiving the magistrate or recklessly disregards the accuracy and completeness of the affidavit," the warrant should be quashed "regardless of whether the omission ultimately is deemed material." *Id.* at 390.

The Court reaches the same determination under California law that it reached under federal law. As previously discussed, Messerschmidt's decision to omit the facts at issue here was reasonable as a matter of law. Because the omissions were reasonable, the Count [sic] need not reach the issue of materiality. Accordingly, Plaintiffs' Motion as it relates to the claims pursuant to the California Constitution is denied and Defendants' Motion to the same effect is granted.

### 3. Qualified Immunity as to Messerschmidt

Defendants have also moved for summary adjudication of the issue on the grounds that Messerschmidt is entitled to qualified immunity

on the federal claims.[9] Because the Court has already determined that Messerschmidt acted reasonably and that there was no constitutional violation, the issue of qualified immunity as it relates to probable cause to believe that Bowen could be found at the Millender Residence is moot.

### C. Nighttime Service

Plaintiffs move this Court to summarily adjudicate the question of whether the affidavit was insufficient to support nighttime service. Defendants also move for summary adjudication of this issue, arguing that the facts in the affidavit did, as a matter of law, justify nighttime service.

California Penal Code § 1533 provides as follows: "Upon a showing of good cause, the magistrate may, in his or her discretion, insert a direction in a search

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[9] In their Opposition, Plaintiffs state that "[q]ualified immunity is not a defense to the Millenders' state law claims (violations of the California Constitution, Article I, §§ 1, 7 & 13, *California Civil Code* §§ 52.1(b) and 51.7, negligence and conspiracy). (Plaintiffs' Opp. at 14:26-15:1). Specifically, they cite *Ogborn v. City of Lancaster* for the proposition that "[t]he doctrine of qualified governmental immunity is a federal doctrine that does not extend to state court claims against government employees." 101 Cal. App. 4th 448, 460 (2002).

Once again, this Court notes that Plaintiffs bring such state claims against the County only under a theory of *respondeat superior*. (*See* Complaint ¶¶ 27-31). Thus, the Individual Defendants' arguments that they are entitled to qualified immunity pertain only to the federal claims brought against them.

warrant that it may be served at any time of the day or night. In the absence of such direction, the warrant shall be served only between the hours of 7 a.m. and 10 p.m." Cal. Penal Code § 1533 (West 2000). Section 1533 further states that "[w]hen establishing 'good cause' under this section, the magistrate shall consider the safety of the peace officers serving the warrant and the safety of the public as a valid basis for nighttime endorsements." *Id.*

"The proper standard for 'good cause' as specified in Penal Code section 1533 is as follows: the affidavit furnished the magistrate must set forth specific facts which show a necessity for service of the warrant at night rather than between the hours of 7 a.m. and 10 p.m." *Tuttle v. Superior Court,* 120 Cal. App. 3d 320, 327-28 (1981) (citing *People v. Watson,* 75 Cal. App. 3d 592, 598 (1977)). Furthermore, "[a]llegations in an affidavit with respect to safety of officers must inform the magistrate of specific facts showing why nighttime service would lessen a possibility of violent confrontation, e.g. that the particular defendant is prepared to use deadly force against officers executing the warrant." *Id.* at 239.

It is undisputed that the magistrate endorsed the warrant for night service (Mann Decl. Exh. J at 88), and that the sworn affidavit includes the following language in specific support of Messerschmidt's request for night service:

> Your Affiant request [sic] that this Search Warrant be endorsed for night service due to

> the fact that the investigation has shown that the primary suspect in this case has gang ties to the Mona Park Crip gang based on information provided by the victim and the cal-gang database. Also your Affiant believes the nature of the crime (Assault with a deadly weapon) goes to show that night service would provide an added element of safety to the community as well as for the deputy personnel serving the warrant, based on the element of surprise.

(*Id.* at 97). In deciding whether a nighttime search is justified, a magistrate need not "rely solely upon the facts the affiant expressly articulates as being those which justify nighttime service." *People v. Lopez,* 173 Cal. App. 3d 125, 138 (1985). "Instead, the magistrate reviews the entire affidavit, as well as any other evidence properly before him, in determining whether sufficient specific facts exist which reveal a necessity for nighttime service." *Id.* Thus, the following information which is undisputedly included in the sworn affidavit, should also be considered in determining whether night service was justified: (1) that the alleged crimes were spousal assault and assault with a deadly weapon (Mann Decl. Exh. J at 94); (2) that the suspect had a violent temper and nature (*Id.*); (3) that the suspect had committed "some previous physical assaults" on the victim (*Id.*); and (4) that the suspect utilized a "black sawed off shotgun with a pistol grip" in the commission of the crime, which he fired at the victim and/or her car five times (*Id.* at 95).

Plaintiffs argue that this information was not enough to justify night service because the allegations regarding officer safety were not specific enough. In particular, Plaintiffs argue that the affidavit was insufficient, because it did not include specific facts that Bowen was likely to use force *against officers* as required by *Tuttle*. In support of this argument, Plaintiffs cite Messerschmidt's deposition testimony that he had "no specific information . . . that Bowen would be a threat to the officers." (Mann Decl., Exh. X at 120:11-121:18). This argument is unpersuasive.

*Tuttle* did not require that an affiant provide specific facts or evidence of violence or a tendency of violence against officers. The facts in the affidavit, that Bowen physically assaulted his girlfriend, shot at his girlfriend with a black sawed-off shotgun, had violent tendencies, had assaulted his girlfriend in the past, and was a member of the Mona Park Crip gang, were sufficient to show the likelihood that he would also use violence against officers.

Plaintiffs further argue that the fact that deputies later arrested Bowen at a motel during the day shows that night service was not justified. However, the facts as to how Bowen's arrest was ultimately achieved do not bear on whether the issuance of a warrant for night service was justified. Plaintiffs' argument that deputies went to the Millender Residence in broad daylight and spoke with Mrs. Millender and Brenda is equally unavailing.

Finally, the cases upon which Plaintiffs rely in support of their argument are not convincing. In *Tuttle,* unlike this case, the only facts in the affidavit were the nature of the contraband (marijuana) and the type of crime (cultivation). The only reference to firearms was general in nature, that "instances of escape and carrying of firearms are becoming more common in the service of search warrants on remote cultivation sites in California." *Tuttle,* 120 Cal. App. 3d at 328. None of the facts included were specific to the suspect at issue. Plaintiffs also cite *United States v. Nielson* for the proposition that Bowen's affiliation with a "gang," and the fact that he was accused of assaulting his girlfriend with a deadly weapon were insufficient to justify night service. 415 F.3d 1195 (10th Cir. 2005). *Nielson* does not support this proposition. In fact, the issue of night service is not even mentioned in *Nielson,* which deals with the question of whether police were justified in making a "no-knock" entry to execute a warrant. *Id.*

Based on the foregoing, this Court finds that the facts specified in the sworn affidavit were sufficient to justify issuance of a warrant endorsed for night service. Accordingly, this Court denies Plaintiff's Motion and grants Defendants' Motion in this regard.

### D. Probable Cause to Search For and Seize the Items Specified in the Warrant

Plaintiffs and Defendants each move for summary adjudication on the question of whether the

warrant established probable cause to search for the items specified in the warrant. It is undisputed that "Attachment 2" to the Search Warrant contained the following language in regards to the property to be searched for and seized:

> All handguns, rifles, or shotguns of any caliber, or any firearms capable of firing ammunition, or firearms or devices modified or designed to allow it to fire ammunition. All caliber of ammunition, miscellaneous gun parts, gun cleaning kits, holsters which could hold or have held any caliber handgun being sought. Any firearm for which there is no proof of ownership. Any firearm capable of firing or chambered to fire any caliber ammunition.
>
> Articles of evidence showing street gang membership or affiliation with any Street Gang to include but not limited to any reference to 'Mona Park Crips,' including writings or graffiti depicting gang membership, activity, or identity. Articles of personal property tending to establish the identity of persons in control of the premises. Any photographs or photograph albums depicting persons, vehicles, weapons or locations, which may appear relevant to gang membership, or which may depict the item being sought and or believed to be evidence in the case being investigated on this warrant, or which may depict evidence of criminal activity. Additionally to include any gang indicia that would establish the persons being sought in this warrant,

> affiliation or membership with the 'Mona Park Crips' street gang.

(Mann Decl. Exh. J at 91).

"In order for a search to be reasonable, the warrant must be specific." *In re Grand Jury Subpoenas Dated December 10, 1987,* 926 F.2d 847, 856 (9th Cir. 1991). "Specificity has two aspects: particularity and breadth." *Id.* "Particularity is the requirement that the warrant must clearly state what is sought." *Id.* "Breadth deals with the requirement that the scope of the warrant be limited by the probable cause on which the warrant is based." *Id.*

Plaintiffs argue that the warrant was overbroad in that it authorized the seizure of articles without probable cause to believe such items were likely to be found in the Millender Residence or were related to the crime at issue. In conjunction with this argument, they contend that the warrant did not describe the items to be seized with sufficient particularity. In support of their argument, Plaintiffs point to the undisputed facts that: (1) according to the affidavit, Bowen was accused of assaulting Kelly with a deadly weapon, a specifically-described black, sawed-off shotgun with a pistol grip (Mann Decl. Exh. J at 94); (2) Defendants knew exactly what the gun looked like because Kelly gave them a photograph of Bowen with the gun (*Id.* at 95); (3) the affidavit did not mention any other weapons or crimes (*Id.* at 88-97); and (4) the affidavit did not assert that Bowen's alleged gang membership had anything to do with the

crime, and Messerschmidt admitted that it did not. (*Id.*; Mann Decl. Exh. X at 119:9-120:10). Based on these facts, Plaintiffs argue that the warrant authorizing the seizure of "everything having to do with any weapon," "evidence of any crime," and "any evidence of gang paraphanalia [sic]" was not supported by probable cause. (P's MSJ at 19:9-11). Therefore, Plaintiffs contend that Defendants should not have seized Mrs. Millender's Mossberg shotgun or the .45 caliber ammunition and should not have been looking through the Millenders' family photograph albums. (*Id.* at 11-13).

Plaintiffs further argue that the authorization to search for "[a]rticles of personal property tending to establish the identity of the person in control of the premise or premises" was oppressively overbroad. (*Id.* at 19:14-15; Mann Decl. Exh. J at 91). First, Plaintiffs argue that evidence of "control of the premises" was irrelevant, and would only be relevant if "one were looking for a murder weapon but did not know who had used it" or if "one were searching a house full of contraband." (P's MSJ at 20:2-7). Plaintiffs contend that there was no question here of who used the shotgun and that, even if there were, evidence of control of the premises would not tie the gun to Bowen, only to Mrs. Millender. Plaintiffs further argue that it was quite apparent that Defendants knew that Mrs. Millender was in control of the home, because they did not take anything tending to show that; rather, "they just used the warrant as an excuse

to turn Mrs. Millender's home upside down." (*Id.* at 20:10-14).

Second, Plaintiffs argue that "[g]eneric classifications in a warrant are acceptable only when a more precise description is not possible." *United States v. Hill*, 459 F.3d 966, 976 (9th Cir. 2006). Thus, Plaintiffs contend that, at the very least, "the warrant should have authorized the seizure of evidence tending to establish control of the black, sawed-off shotgun, if one were found." (P's MSJ at 20:21-23).

As an initial matter, the Court notes that, in making their argument, Plaintiffs have made several misstatements. First, the warrant did not authorize the seizure of "everything having to do with *any weapon*." Rather, its authorization was limited to firearms and things related to firearms, presumably on the grounds that a firearm was used in the commission of the alleged crime. (Mann Decl. Exh. J at 91). Second, the warrant did not authorize "evidence of any crime," but instead authorized seizure of "[a]ny photographs or photograph albums . . . which may depict evidence of criminal activity." (*Id.*) Therefore, to summarize, Plaintiffs' chief complaints are that the warrant was overbroad in its authorization of: (1) the seizure of all firearms and firearm-related items; (2) the seizure of articles of evidence showing or relevant to gang membership; and (3) the seizure of articles of personal property tending to establish the identity of persons in control of the premises.

The Ninth Circuit has made abundantly clear that "[t]he scope of the warrant, and the search, is limited by the extent of the probable cause," and that "probable cause must exist to seize all the items of a particular type described in the warrant." *In re Grand Jury Subpoenas,* 926 F.2d at 857. Therefore, this Court must look at each of Plaintiffs' complaints.

First, as to Plaintiffs' contentions regrading [sic] the search for firearms, it is undisputed that: (1) Bowen was accused of assaulting Kelly with a specifically-described sawed-off shotgun; (2) that Kelly gave Defendants a photograph of Bowen with the shotgun; and (3) that the affidavit did not mention any other weapons or crimes. (Mann Decl. Exhs. C & J). Defendants argue that, even so, the warrant was reasonably specific, because "any caliber of shotgun or receipts would show possession of and/or purchase of guns." (Defendants' Opp. at 18:28-19:1). This argument is nonsensical and unpersuasive. The crime specified here was a physical assault with a very specific weapon. Therefore, Defendants were not entitled to search for all firearms and the warrant was overbroad in this respect.

Second, Plaintiffs argue that the authorization to seize gang-related information was overbroad, because, as Messerschmidt admitted, there was no evidence that the crime at issue was gang-related. (*See* Messerschmidt Depo. at 119:9-120:10). In response, Defendants make the unsupported statement that "[t]he photos sought re gang membership could be linked with other gang members, evidencing

criminal activity as gang affiliation is an enhancement to criminal charges." (Defendants' Opp. at 19:1-3). This argument is unconvincing. Plaintiffs are correct that California Penal Code § 186.22(b)(1) limits gang enhancements to cases where the underlying crime was gang-related. Specifically, it states that "any person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members," may, at the court's discretion, be punished with an additional term of two to ten years depending on the nature of the underlying crime. Cal. Penal Code § 186.22(b)(1) (West Supp. 2007). Defendants do not point to any other basis for their argument or make any additional arguments. Therefore, this Court finds that the warrant was overbroad in its authorization to seize gang-related items.

Finally, Plaintiffs argue that the warrant was overbroad in its authorization to seize evidence of who controlled the premises, because such evidence was irrelevant in that Defendants already knew that the shotgun at issue was Bowen's and evidence of who controlled the premises would only tie the gun to Mrs. Millender and not to Bowen. The Court is not convinced. Plaintiffs acknowledge that evidence of who controlled the premises would be relevant "if incriminating evidence were found and it became necessary to tie that evidence to a person." (Plaintiffs' MSJ at 20:2-4). The mere fact that Defendants had a

picture of Bowen with the shotgun and testimony of the victim, did not prevent them from, in an abundance of caution, seeking additional ways of tying Bowen to the weapon. In fact, failure to seek all potential evidence tying Bowen to the weapon would likely have subjected them to criticism as well. Finally, that Defendants may have known that Mrs. Millender owned the residence is irrelevant. Bowen, too, could have had control of the premises to some extent, such that he could have stored a weapon there. In fact, this explains why Defendants did not seize evidence that Mrs. Millender controlled the premises and only seized evidence that *tended to establish* that Bowen controlled the premises.[10] Therefore, the Court finds that, as a matter of law, the warrant was not overbroad in respect to its authorization to seize evidence tending to establish who controlled the premises.

Defendants contend, though, that even if it was overbroad, the warrant was valid, because "[a]n affidavit providing more guidance than an overbroad

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[10] Plaintiffs note that Defendants did seize a letter addressed to Bowen, which they claim was not authorized, because it did not tend to establish who was "in control of the premises." Specifically, they argue that not everyone who receives mail at a location is in control of that location. While this may be true, this Court disagrees with Plaintiffs' assertion. Although ultimately it may be determined that a person receiving mail at a certain address was not in control of the premises, the receipt of mail at a certain location certainly may *tend to establish* such control.

warrant may cure the warrant's overbreadth" if "(1) the warrant expressly incorporated the affidavit by reference and (2) the affidavit either is attached physically to the warrant or at least accompanies the warrant while agents execute the search." *United States v. Bridges,* 344 F.3d 1010, 1018 (9th Cir. 2003). In support of this argument, Defendants point to the language of Attachment 2, which is set out above. That language is the very "overbroad" language to which Plaintiffs are referring and, therefore, does nothing to cure the warrant.

The Court notes that the Search Warrant does specifically incorporate Messerschmidt's "Statement of probable cause" which includes specific information about the crime at issue, the weapon used, Bowen's gang membership, etc. (Mann decl. Exh. J at 88, 94-97). However, Defendants make no effort to explain how such Statement cures the warrant's overbreadth, and this Court finds that, as a matter of law, it does not.

Accordingly, this Court grants Plaintiff's Motion for Summary Adjudication on the issue of the overbreadth of the warrant as it relates to its authorization to seize all firearms and firearm-related items and all gang-related evidence. However, the Court grants Defendants' Motion for Summary Adjudication as it relates to the authorization to seize evidence tending to establish the identity of persons in control of the premises.

### E. Knock and Announce/Unlawful Entry

Plaintiffs next argue that, as a matter of law, Defendants violated California Penal Code § 1531, the California Constitution and the Fourth Amendment to the United States Constitution, because they broke into the Millender Residence without giving Plaintiffs an opportunity to open the door. Defendants, on the other hand, argue that the entry was lawful and that they are entitled to summary adjudication in that regard.

"The Fourth Amendment to the Constitution protects '[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.'" *Wilson v. Arkansas*, 514 U.S. 927, 931 (1995). The "common-law 'knock and announce' principle forms a part of the reasonableness inquiry under the Fourth Amendment," such that "the reasonableness of a search of a dwelling may depend in part on whether law enforcement officers announced their presence and authority prior to entering." *Id.* at 929, 931. Nevertheless, not "every entry must be preceded by an announcement" and "breaking is permissible in executing an arrest under certain circumstances." *Id.* at 934 (internal citations omitted). "An officer's noncompliance with the knock and announce rule is excused . . . if exigent circumstances exist." *United States v. Reilly*, 224 F.3d 986, 991 (9th Cir. 2000). "Exigent circumstances are 'circumstances that would cause reasonable person to believe that entry was necessary to prevent physical harm to the officers or other persons, the destruction

of relevant evidence, the escape of the suspect, or some other consequence improperly frustrating legitimate law enforcement efforts.'" *Id.* (internal citations omitted). "The determination of exigent circumstances is a mixed question of law and fact." *Id.*

Similarly, under California law, "[t]he officer may break open any outer or inner door or window of a house, or any part of house, or anything therein, to execute the warrant, if, after notice of his authority and purpose, he is refused admittance." Cal. Penal Code § 1531 (West 2000). "An unreasonable delay in responding to a knock and announce is tantamount to a refused admittance." *People v. Hoag,* 83 Cal. App. 4th 1198, 1207 (2000). Defendants contend that they were entitled to "break in," because they were refused admittance. Plaintiffs, however, argue that this Court should reject such claim, because it is undisputed that Defendants did not give Plaintiffs sufficient time to open the door. Both Parties submitted an audio recording of the entry, which they agree took place at approximately 5:00 in the morning. (Mann Decl. Exh. L; Declaration of Scott William Walker ("Walker Decl."), ¶¶ 12 and 27 and Exh. AA attached thereto).

Based on that audio recording, Plaintiffs argue that Defendants began breaking in as soon as the pre-recorded announcement began to play. (Mann Decl. Exh. L). Walker states that the SWAT team personnel provided knock-notice both verbally and by way of a public address system, and that, after the occupants failed to comply with notice and waiting a

reasonable amount of time, the team made a forcible entry. (Walker Decl. ¶¶ 13 & 14). Defendants claim that the length of time between the knock/notice and entry was reasonable, because Walker received information that there was a light on and movement in the house. (*Id.* at ¶ 12). Defendants further claim that approximately 20 seconds elapsed from the time Walker asked for the pre-recorded announcements to be started to the time when they actually gained entrance into the residence after porting the window and breaking the door. (*Id.* at ¶ 14). In response to Walker's estimate of time, Plaintiffs correctly argue that Walker's "stop" and "start" points are wrong. "The proper trigger point . . . is when those inside should have been alerted that the police wanted entry to execute a warrant." *United States v. Smith,* 63 F.3d 956, 962 (10th Cir. 1994). Furthermore, common sense and the policy behind the knock and announce requirement of avoiding needless destruction of private property, dictate that the "ending point" should be the point at which Defendants began the forcible entry. *See Hoag,* 83 Cal. App. 4th at 1211; *see also United States v. Chavez-Miranda,* 306 F.3d 973, 980 (9th Cir. 2002).

After listening to the audio tape, this Court finds that the forcible entry began somewhere between 2 and 9 seconds after the announcements began playing (and between 5 and 12 seconds after Walker called for the announcements). (Mann Decl. Exh. L; Walker Decl. Exh. AA). It is impossible to determine from the audio recording exactly when the "breaking

in" began. However, banging of some sort can be heard no more than 2 seconds after the announcements began, deputies were ordered to "break and rake" (meaning break the front window) 5 seconds after the announcements began, and the window can be heard breaking 9 seconds after announcements began. (*Id.*) The first verbal announcements that can be heard (aside from the pre-recorded announcements from the PA system) come at approximately the same time as the window can be heard breaking. (*Id.*) Walker states, however, that several verbal announcements were made before he ordered the deputies to "break and rake." (Walker Decl. ¶ 13). In listening to the audio tape, background noises including voices can be heard at certain points, but it is impossible to ascertain what exactly is being said. Therefore, considering the evidence in the light most favorable to the non-moving party (in the case of Plaintiffs' Motion), it is possible that additional announcements were made, which cannot be heard on tape. Finally, the announcement that the doors were open came approximately 13 seconds after the pre-recorded announcements began. (*Id.*)

While it is true that "[t]here is no established time that the police must wait" in order to constructively infer refused admittance, "the lapse of time must be reasonable considering the particular circumstances of the situation." *Chavez-Miranda,* 306 F.3d at 980. "When evaluating reasonableness, we consider such circumstances as (1) the size and layout of the residence; (2) the time of day; (3) the nature of

the suspected offense; (4) the evidence demonstrating guilt; and (5) the officers' other observations that would support forced entry." *Id.* While it is undisputed that members of the entry team drove by the Millender Residence two days before the execution of the warrant and took photographs, there is no evidence that they knew anything about the layout of the house. Therefore, this information cannot be applied in this case in order to determine how long officers should reasonably have waited before entering forcibly. As for the time of day, it is reasonable to believe that, at 5:00 a.m. the occupants would be asleep. On the other hand, it is not unheard of that people begin to wake up at this time of day in order to get ready for work. Therefore, this information is likewise not particularly helpful in this case. Defendants, however, present evidence of the final three factors in support of their position.

As to the "nature of the suspected offense" and the "evidence demonstrating guilt," it is undisputed that the underlying crime was assault with a deadly weapon, namely a sawed-off shotgun, and that the victim of the alleged crime specifically testified to that fact. (Mann Decl. Exhs. C & J). The victim also testified to the facts that Bowen had violent tendencies and had assaulted her on prior occasions. (Mann Decl. Exh. J). Finally, it is undisputed that Bowen had a violent history including multiple felony and misdemeanor arrests involving weapons (Messerschmidt Decl. ¶ 11, Exh. G), was a three-strike candidate (Messerschmidt Decl. ¶ 25), and was

a known member of the Mona Park Crips gang. (*Id.*; Mann Decl. Exhs C & J).

Additionally, Defendants argue that there was other evidence to support forced entry in that, as the entry team was approaching the house, a member of the containment team communicated by radio that he saw a light on and movement in the back of the house. (Walker Decl. ¶ 12; Deposition of Rick O'Neill Rector, August 2, 2006 ("Rector Depo."), Exh. U to Declaration of Eugene Ramirez ("Ramirez Decl."), 62:4-63:5; Deposition of John Stuart Bones, August 1, 2006 ("Bones Depo."), Exh. W to Ramirez Decl. at 38:12-39:21, 41:1-23, 43:1-3; Deposition of Brice Alan Stella, August 3, 2006 ("Stella Depo."), Exh. X to Ramirez Decl., 55:19-23; County of Los Angeles Sheriff's Department Supplemental Report, attached as Exh. KK to Ramirez Decl.). Officer Bones specifically testified that he was the deputy who radioed, indicating that he saw movement at the back of the house. (Bones Depo. at 38:12-39:21, 41:1-23). He could not remember whether he also reported seeing light. (*Id.* at 43:1-3). At least three other deputies also testified that this communication was made. Based on this information, Walker inferred that someone was up and moving, potentially Bowen. He considered the possibility that the historically violent suspect would have the opportunity to arm himself,[11] and the

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[11] "[I]f an occupant is predisposed to resist an entry by police, a substantial delay between announcement and entry could only give him time to prepare." (*People v. Trujillo*, 217 Cal.

(Continued on following page)

safety of officers and other residents. Therefore, in his opinion, the circumstances became exigent. (Walker Decl. ¶ 12).

The supplemental report regarding the service of the search warrant states that "when there was no response from the interior of the main house and when containment personnel began to see movement in the addition on the east side of the house, Deputies . . . began to try to force upon [sic] the front security door." (Ramirez Decl. Exh. KK). However, Plaintiffs point out that this information was *not* included in the Team Activation Packet, which simply states the reason for forcible entry as refused admittance. (Mann Decl., Exh. K). Similarly, the communication was not recorded or documented by the deputy whose job it was to document everything on the radio log. (Cook Decl. Exh. GG).

While Defendants argue that this justified the forcible entry as a matter of law, Plaintiffs contend that generic movement, without more, is not enough. *See People v. Trujillo,* 217 Cal. App. 3d 1219, 1226-27 (1990). This Court notes, however, that, in *Trujillo,* the court specifically mentioned that the movement could have been a dog whereas here Bones specifically testified that the movement was "human." Furthermore, the policy behind the knock and announce rule of preventing injury to the police or

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3d 1219, 1227 (1990) (citing *People v. Tacy,* 195 Cal. App. 3d 1402, 1420 (1987) (quoting *Bustamante-Gamez,* 488 F.2d at 11).

citizens who would react aggressively to a surprise entry is served when the police actually announce their presence. *Id.* at 1227. Even so, this Court finds that it is unable to reach a decision at this time as to whether or not the forced entry was reasonable as a matter of law. There are genuine issues of material fact that bear on this decision including, for instance, whether the "movement" appeared to be based upon knowledge of the Sheriff's Department's presence, what exactly the movement was and when exactly it occurred, when exactly Defendants began breaking in versus simply banging on the door, why the communication regarding movement at the back of the house was not documented in all relevant places, and the exact timing of various actions by deputies. The Court finds that these facts and others are in dispute and that it is necessary to hear testimony from the parties and witnesses in order to provide further information and to assess credibility.[12] Accordingly, this Court

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[12] The Court notes that the Parties also submitted an expert report and deposition testimony indicating that the entry team acted reasonably in executing the warrant. The Court's opinion was not influenced in either direction by that evidence. Nevertheless, this evidence may be relevant in making a final determination.

Similarly, Plaintiffs make the argument that there was "evidence of improper motivation" on the part of Defendants, because when they visited the Millender Residence prior to the search, they allegedly "laughed" when Mrs. Millender told the deputies that they could come in if they had a warrant. This is not undisputed evidence, but could impact the ultimate decision as to reasonableness.

denies both Plaintiffs' and Defendants' Motions regarding the lawfulness of the entry.

### F. Qualified Immunity for Individual Defendants

In a suit against an officer for an alleged violation of a constitutional right, the court must consider, as a threshold matter, whether the officer is entitled to qualified immunity. *See Saucier v. Katz,* 533 U.S. 194, 200 (2001). Qualified immunity is "an immunity from suit rather than a mere defense to liability." *Id.* (quoting *Mitchell v. Forsyth,* 472 U.S. 511, 526 (1985)). The first inquiry under a qualified immunity defense is whether the facts alleged, in the light most favorable to plaintiff, show the officer's conduct violated a constitutional right. *See id.* at 201. If no constitutional right would have been violated, then the inquiry ends, and the defendant is entitled to qualified immunity. *See id.* Assuming the plaintiff clears the first hurdle of the qualified immunity defense, the second inquiry is whether the right was clearly established. *Id.* "The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violated that right." *Id.* The inquiry is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted. *See id.* Therefore, "law enforcement officers are entitled to qualified immunity if they act reasonably under the circumstances, *even if* the actions result in a constitutional violation." *Wilson v. Layne,* 526 U.S. 603, 614 (1999).

The Individual Defendants move this Court for summary judgment on the issue of qualified immunity as it relates to each of Plaintiffs' federal claims against them.

### 1. Probable Cause to Believe that Bowen Would be Found at the Millender Residence

In addressing the issue of whether the affidavit established probable cause to believe that Bowen would be found at the Millender Residence, this Court determined that the affidavit was valid as a matter of law. Thus, there was no constitutional violation in this respect. Accordingly, all Individual Defendants are entitled to qualified immunity as a matter of law, and Defendants' Motion to such effect is granted.

### 2. Nighttime Service

In this Order, the Court has already considered the question of whether the facts specified in the affidavit were sufficient to justify issuance of a warrant endorsed for night service. In doing so, the court concluded that, as a matter of law, the affidavit was sufficient in this respect and that, therefore, there was no resulting constitutional violation. Accordingly, all Defendants are entitled to qualified immunity, as a matter of law, and Defendants' Motion to such effect is granted.

### 3. Probable Cause to Search For and Seize the Items Specified in the Warrant

Once again, this Court has already considered the question of whether the warrant established probable cause to search for the items specified in the warrant. In doing so, this Court determined that the warrant was overbroad in its authorization to seize all firearms and firearm-related items and gang-related items. Defendants made no additional arguments as to why, even if the warrant was overbroad, the officers acted reasonably, without knowing that what they were doing was wrong. However, it is undisputed that the SWAT Defendants did not participate in the actual search for and seizure of evidence. (Walker Decl. ¶¶ 19-21, 24). Therefore, the SWAT Defendants are entitled to qualified immunity. Accordingly, Defendants' Motion is granted as it relates to SWAT Defendants and denied as it relates to the remaining Individual Defendants.

### 4. Unlawful Entry/Knock and Announce

Defendants assert that the SWAT Defendants are entitled to qualified immunity on Plaintiffs' claims for unlawful entry, because they did comply with the knock/notice requirements and, even if there was a constitutional violation, they acted reasonably under the circumstances. Once again, the Court has discussed the issue of unlawful entry in detail and determined that questions of fact remain on a number of issues, including the alleged "movement" in the

back of the house just prior to execution of the warrant. As previously discussed, these issues also go to the "reasonableness" of the SWAT Defendants' actions in the case that a constitutional violation is found. Therefore, facts material to the question of qualified immunity are in dispute. Accordingly, this Court denies Defendants' Motion as it relates to the SWAT Defendants.

The Court further notes that it is unable to find any specific allegations in regards to the other Individual Defendants, namely Messerschmidt and Lawrence, on the unlawful entry claim. Therefore, Defendants Motion on the grounds of qualified immunity is granted as it relates to Defendants Messerschmidt and Lawrence.

### 5. Unreasonable Detention/Excessive Force

Plaintiffs assert that, during the search, Defendants illegally detained them in violation of their constitutional rights, (Complaint ¶ 18), and that Defendants subjected Plaintiffs to excessive force including but not limited to pointing firearms at them. (*Id.* at ¶ 19). Individual Defendants argue that they are entitled to qualified immunity because their detention of Plaintiffs was reasonable, and they did not use excessive force. In support of this contention, Individual Defendants rely on *Muehler v. Mena,* 544 U.S. 93 (2005). In *Mena,* the United States Supreme Court held that "officers executing a search warrant [ ] have

the authority to detain the occupants of the premises while a proper search is conducted." *Id.* at 98 (internal citations and quotations omitted). The Court further explained that "the detention of an occupant is surely less intrusive than the search itself, and the presence of a warrant assures that a neutral magistrate has determined that probable cause exists to search the home." *Id.* Therefore, such detentions are appropriate "because the character of the additional intrusion caused by the detention is slight and because the justifications for detention are substantial." *Id.*

Following is Plaintiffs' opposition in its entirety:

> The Millenders claim their detention was unreasonable because there was no probable cause to support the warrant in the first place, and because defendants failed to give proper knock-notice before breaking into the house. *Muehler v. Mena*, 544 U.S. 93 (2005), is distinguishable. Being required to stay outside for two hours in the cold without being able to use the bathroom was unreasonable.

(Plaintiffs' Opp. at 13:18-23). Plaintiffs first argument, therefore, is that Plaintiffs' detention was unreasonable as a matter of law (and, regardless of the particular facts), because there was no probable cause to support the warrant in the first place, and because the Entry Team violated established "knock and announce" rules. Plaintiffs are correct that *Mena*

presupposes a valid warrant. Here, though, the Court has already determined that there was probable cause to believe that Bowen was at the Millender Residence and that, therefore, the warrant was valid. Furthermore, that a triable issue of fact remains as to whether the entry was unlawful does not bear on the reasonableness of the detention. Plaintiffs, themselves, argue that they were not given sufficient time to answer the door before Defendants broke in. Thus, it is clear that Defendants ultimately would have gained entry to the Millender Residence, and Plaintiffs would have been detained.

Plaintiffs' second argument in opposition to Defendants' Motion is that the detention was unreasonable, because Plaintiffs were required to stay outside for two hours in the cold without being able to use the bathroom.

In *Mena,* the court held that officers executing a search warrant may detain the occupants of the premises while conducting a proper search. *Id.* at 98. In reaching this decision, the court also held that officers may use reasonable force to effectuate the detention, including the use of handcuffs. *Id.* Thus, in *Mena,* a 2 to 3 hour detention in handcuffs was reasonable. This was particularly true where the "governmental interests in not only detaining, but using handcuffs, are at their maximum" because "a warrant authorizes a search for weapons and a wanted gang member resides on the premises." *Id.* at 100.

It is undisputed that, while they were not allowed to retrieve shoes or coats, Plaintiffs were allowed to sit in patrol cars for the majority of this time and were given blankets. One deputy even turned on the heat for Johnson. Furthermore, in reviewing the audio tape of the entry, it appears to the Court that the SWAT Defendants were very courteous to Plaintiffs. Plaintiffs do not argue otherwise. It is also undisputed that SWAT Defendants only pointed their weapons at or in the direction of Plaintiffs for a short period of time, while they were clearing and securing the premises. While Johnson was handcuffed for at least a portion of the time, Plaintiffs have not pointed to evidence of injury. Furthermore, as provided in *Mena,* Defendants were entitled to handcuff Plaintiffs during the search. It is also undisputed that the suspect sought was, in fact, a known gang member.

Plaintiffs complain about the amount of time they were required to stay outside. There is some dispute on this issue. Defendants appear to argue that Plaintiffs were allowed to come into the living room once the main and back houses were secured, which was approximately 45 minutes after the initial entry. However, Plaintiffs argue that they were required to remain outside for almost two hours. Even if Plaintiffs are correct, this was not unreasonable considering that Plaintiffs were allowed to sit in patrol cars and were given blankets. Furthermore, it is undisputed that Plaintiffs were ultimately brought

back into the house while the search was still being conducted.

Additionally, Plaintiffs focus on the fact that Mrs. Millender was not allowed back into the house to go to the bathroom. Mrs. Millender simply testifies that she told an officer that she needed to use the restroom, and he told her that she could not go back into the house. Therefore, in her words, she "couldn't do anything but use the restroom in the street." (Augusta Millender Deposition, April 14, 2006, (A. Millender Depo.), 51:14-21, Exh. U to Mann Decl.). Defendants present testimony, however, that she was told she would be able to go into the house and use the restroom as soon as the house was secured. While neither party points to evidence of timing, Augusta Millender's deposition testimony appears to be that she made her request approximately 30 minutes after she was taken outside (approximately 5:30 a.m.). It is undisputed that the SWAT Defendants did not finish securing the residence until approximately 5:45 a.m. Therefore, it was not unreasonable for Defendants to require Mrs. Millender to wait until the house was secure, before returning to use the restroom. It would have been unsafe to allow Mrs. Millender back into the house, before it had been secured.

Therefore, considering all of the evidence presented in the light most favorable to Plaintiffs, this Court finds that, as a matter of law, Defendants' detention of Plaintiffs was not unreasonable. Accordingly, Individual Defendants are entitled to qualified

immunity in this respect, and Individual Defendants' Motion on this issue is granted.

**6. Unreasonable Destruction of Property**

Defendants next argue that they are entitled to qualified immunity on the issue of wrongful or unreasonable destruction of property. It is undisputed that, at the very least, the following property was damaged in the execution of the search warrant: (1) "Metal security door, bent down the center with two holes, in the screen, towards the locking mechanism"; (2) "4'-6' plate glass window, broken"; and (3) "Wooden door jam and locking plate, splintered and broken." (Ramirez Decl. Exh. KK). In their Opposition, Plaintiffs contend that Defendants made a mess of the house, broke down a bedroom door even though the other door to the same bedroom was open, and broke the front door and the living room picture window.

Nevertheless, Defendants argue that they acted reasonably because "officers executing a search warrant occasionally must damage property in order to perform their duty." *Dalia v. United States*, 441 U.S. 238, 258 (1979). They contend that "only unnecessarily destructive behavior, beyond that necessary to execute a warrant effectively, violates the Fourth Amendment." *Mena v. City of Simi Valley*, 226 F.3d 1031, 1041 (9th Cir. 2000).

Defendants are correct that not all destruction of property violates the Fourth Amendment. However, this Court has ruled that questions of fact exist as to

whether the SWAT Defendants violated knock and announce requirements. Therefore, it logically follows that, questions of fact exist as to whether SWAT Defendants acted reasonably in regards to the destruction of property. In other words, if the SWAT Defendants are not entitled to qualified immunity on the unlawful entry claim, then they cannot be entitled to qualified immunity on the destruction of Plaintiffs' plate glass window. Thus, Defendants Motion in this regard is denied.

Plaintiffs, however, have not made any allegations against the remaining Individual Defendants other than, potentially, that they "made a mess of the house." Plaintiffs do not provide anything more concrete. As unfortunate as it is, searches often result in messes being made, and this alone does not amount to unreasonable destruction of property. Therefore, this Court finds that the remaining Individual Defendants, namely Messerschmidt and Lawrence, are entitled to qualified immunity. Therefore, Individual Defendants' Motion in this respect is granted as to Messerschmidt and Lawrence only.

### 7. Conspiracy

In support of their argument that they are entitled to qualified immunity on Plaintiffs' conspiracy claim, Individual Defendants make the bare assertion that:

> Defendants conspired to deprive them of their Fourth Amendment rights. (Count 1.)

> The conspiracy claim fails as there is no evidence of an underlying constitutional violation.

(ID's MSJ at 24:18-21). However, this Court has found that questions of fact exist as to whether there is an underlying constitutional violation. Because Defendants fail to make any further arguments regarding the conspiracy claim, summary judgment is not warranted at this time.

### G. *Monell* Claims

In Count Three of their Complaint, Plaintiffs assert that "[a]ny governmental entity defendant and any police supervisorial defendant is liable to each plaintiff for all wrongs alleged" in the Complaint under *Monell v. New York Dept. of Social Services*, 436 U.S. 658 (1978). More specifically, Plaintiffs allege that:

> Defendants County of Los Angeles, Los Angeles County Sheriff's Department, Leroy Baca and Does are alleged to have maintained or permitted an official policy or custom or practice causing or permitting the occurrence of the types of wrongs set forth herein below knowingly, with gross negligence, or with deliberate indifference and, based on the principles set forth in *Monell v. New York City Department of Social Services,* 436 U.S. 658 (1978), and *City of Canton v. Harris,* 489 U.S. 378 (1989), are liable for all injuries

> sustained by any plaintiff as set forth herein below.

(Complaint ¶ 10).

In order to sustain their *Monell* claims against the Municipal Defendants under 42 U.S.C. 1983, Plaintiffs must show that Municipal Defendants had in effect a custom, policy, or practice that caused a violation of their federal constitutional rights. *Monell,* 436 U.S. at 691, 694. Evidence of a single alleged constitutional violation cannot establish a custom, policy or practice under *Monell. Oklahoma City v. Tuttle,* 471 U.S. 808, 823-24 (1985); *Nadell v. Las Vegas Metropolitan Police Dept.,* 268 F.3d 924, 929-30 (9th Cir. 2001). "Several requirements must be satisfied for a municipality to incur liability. First, the injury must amount to a constitutional deprivation." *Jackson v. Gates,* 975 F.2d 648, 654 (9th Cir. 1992). "Second, the municipality will be held to have caused an injury only when the acts which produce it were sanctioned by the municipality." *Id.* Finally, "[t]he third requirement specifies that only municipal officials who have 'final policy-making authority' may, by their actions, subject the municipality to § 1983 liability." *Id.* (quoting *Pembaur v. City of Cincinnati,* 475 U.S. 469, 480 (1986)).

Plaintiffs ask this Court to summarily adjudicate the question of whether Defendants acted pursuant to custom, practice and policy. Municipal Defendants, on the other hand, move for summary judgment on the *Monell* claims on the following grounds: (1) Plaintiffs

cannot establish *Monell* liability against them because they have failed to identify or present evidence of a constitutionally infirm policy; (2) Municipal Defendants cannot be held liable, because Individual Defendants did not commit any constitutional violations; (3) Municipal Defendants cannot be held liable, because Individual Defendants are entitled to qualified immunity; and (4) Sheriff Baca is not a proper Defendant.

### 1. Whether the Individual Defendants Acted Pursuant to Custom, Practice or Policy

In support of their Motion, Plaintiffs contend that competent testimony that the conduct in question was in accord with or pursuant to the entity's customs, practices or policies is direct evidence of the entity's customs, practices or policies. *See LaLonde v. County of Riverside,* 204 F.3d 947, 961-62 (9th Cir. 2000); *see also Clipper v. Takoma Park, Maryland,* 876 F.2d 17 (4th Cir. 1989). In both of these cases, the court determined that evidence that an officer believed his actions were in accordance with custom, practice, and policy was relevant to the plaintiff's *Monell* claims. Furthermore, Plaintiffs argue that "ratification" is also evidence of custom, practice and policy. *See, e.g., McRorie v. Shimoda,* 795 F.2d 780, 784 (9th Cir. 1986) (stating that "[p]olicy or custom may be inferred if," after the questioned action, officials "took no steps to reprimand" or "otherwise failed to admit . . . conduct was in error.") Therefore, Plaintiffs submit evidence

that the Individual Defendants have acknowledged that their actions were in accordance with Department policy and claim they acted properly. Specifically, Plaintiffs point to the following testimony:

- Messerschmidt's testimony that as far as he was aware his investigation was done and his affidavit written in accordance with the training he received, and that no one ever told him otherwise. (Messerschmidt Depo. at 140:15-24);
- Walker's testimony that the actions he took prior to the execution of the warrant were in accordance with the training he received, that no one ever told him otherwise, and that his training has not changed since then. (Walker Depo. at 137:19-138:22);
- Walker's testimony that the actions he took in "forcing entry" into the Millender Residence (including the amount of time he waited after the announcements, pointing a firearm at Plaintiffs, searching for people, and reporting of the warrant execution) were in accordance with his training and no one ever told him otherwise. (*Id.* at 138:23-140:25);
- Rector's testimony that his scouting of the Millender Residence, contact with the Millenders on the day before the search, forced entry into the Millender Residence, amount of time waited before breaking in, pointing of firearm in specific manner, and documentation of the execution were in accordance with the training he received and

that no one ever told him otherwise. (Rector Depo. at 98:5-99:17);

- Stella's testimony that his scouting, contact with the men shooting dice, forced entry, amount of time waiting before entering, search for people, and reporting were in accordance with the training he received and that no one ever told him otherwise. (Stella Depo. at 94:20-97:2);

- Nichiporuk's testimony that his scouting, forced entry, amount of time waited before forcing entry, manner of pointing firearms, and search were in accordance with the training he received and no one every [sic] told him otherwise. (Nichiporuk Depo. at 85:10-87:21).

Plaintiffs also submit evidence that Messerschmidt's s eriors, Lawrence, Ornales and Deputy D.A. Wilson reviewed the warrant affidavit before it was submitted and that Lieutenants Maxwell and Evans reviewed audiotapes and reports regarding the entry. (Messerschmidt Depo. at 30:25-32:22; Deposition of Patrick Edward Maxwell, August 8, 2006 ("Maxwell Depo."), attached as Exh. CC to the Mann Decl., 36:15-37:5, 51:17-53:11, 55:10-25, 81:13-21, 138:12-129:3, & 37:23-39:13).

Plaintiffs are correct that this testimony is relevant to their *Monell* claims. However, this Court cannot determine, based on this evidence alone, that Individual Defendants acted pursuant to County policy, custom or practice. Rather, the evidence shows

that these particular Individual Defendants *believe* they acted in accordance with such policy. Therefore, the Court denies Plaintiffs' Motion for Summary Adjudication on this issue.

### 2. Whether Plaintiffs Have Presented Sufficient Evidence of a Constitutionally Infirm Policy to Withstand Summary Judgment on Their *Monell* Claims

Municipal Defendants contend that they are entitled to summary judgment on Plaintiffs' *Monell* claims because Plaintiffs fail to present any evidence of a custom, policy or practice that caused a violation of federal constitutional rights. Defendants argue that Plaintiffs have, likewise, failed to establish that Individual Defendants committed some wrong, and that the Municipal Defendants' policy was the "moving force" behind that conduct.

A policy is a "deliberate choice to follow a course of action . . . made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question." *Fairley v. Luman,* 281 F.3d 913, 918 (9th Cir. 2002) (per curiam) (internal citations omitted). Therefore, liability may attach when an employee acts pursuant to an "expressly adopted official policy," *Lytle v. Carl,* 382 F.3d 978, 982 (9th Cir. 2004), or where an employee committed a constitutional violation pursuant to a "long standing practice or custom."

*Webb v. Sloan,* 330 F.3d 1158, 1164 (9th Cir. 2003), *cert. denied,* 540 U.S. 1141 (2004). Regardless, the policy or practice must be so "persistent and widespread" that it constitutes a "permanent and well settled city policy." *Fairley,* 281 F.3d at 918. The custom, policy or practice need not, in and of itself, be unconstitutional in order to permit *Monell* liability. *City of Canton v. Harris,* 489 U.S. 378, 386 (1989). Additionally, such policy may be one of action or inaction. *Long v. County of Los Angeles,* 442 F.3d 1178, 1185 (9th Cir. 2006).

Plaintiffs contend that they may establish Municipal liability by showing any one of the following three things: (1) a custom, practice or policy, which caused a constitutional violation; (2) that "the County was deliberately indifferent to a need to properly train its employees," *Canton,* 489 U.S. at 387; *Fairley,* 281 F.3d at 917; or (3) that the County "ratified the unconstitutional conduct." *Larez,* 946 F.2d at 630. While this Court agrees with Plaintiffs' general premise that a municipality may, in certain circumstances, be liable on *Monell* claims where it ratified unconstitutional conduct or failed to act, the requirement of a "custom, practice or policy" is present under all such theories.

For instance, "[t]o impose liability against a county for its failure to act, a plaintiff must show: (1) that a county employee violated the plaintiff's constitutional rights; (2) that the county has *customs or policies* that amount to deliberate indifference, and (3) that these customs or policies were the moving

force behind the employee's violation of constitutional rights." *Long,* 442 F.3d at 1186 (emphasis added). Likewise, under the "ratification" theory, municipal liability attaches only where "a deliberate choice is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question." *See Gillette v. Delmore,* 979 F.2d 1342, 1347 (9th Cir. 1992); *see also Larez,* 946 F.2d at 645 (in which the court held that Chief Gates could be officially liable based on his ratification of a decision that deprived plaintiffs of their constitutional rights if the ratification was "attributable to an official policy or custom.")

Therefore, that Plaintiffs are proceeding in their *Monell* claims under these particular theories does not eliminate the fact that they must submit evidence of an official policy or custom. Plaintiffs have not done so here. They have not clearly and expressly articulated the policy they are challenging. While Plaintiffs do submit evidence in the form of testimony that tends to support their arguments of failure to act and that Individual Defendants acted according to custom and policy in committing the alleged constitutional violations in this case, evidence of a single alleged constitutional violation cannot establish a custom, policy or practice under *Monell.*

In an attempt to demonstrate a custom, practice or policy, Plaintiffs submit evidence of what they contend are incidents similar to what occurred at the

Millender Residence.[13] Specifically, Plaintiffs cite four cases in which they claim announcements were made almost simultaneously with breaking in "several incidents" where reports indicate that officers waited approximately 20 or more seconds and then broke in, and other incidents where the plan was to set a hook on the door before announcing their presence, resulting in unnecessary property destruction. (Declaration of Samantha Koerner and Exhibits in Support of Plaintiffs' Supplemental Brief ("Koerner Decl.") ¶¶ 4-16).

This evidence does not create a genuine issue of fact. The numbers that Plaintiffs present regarding potentially similar incidents are entirely without context. For instance, no evidence is presented regarding the overall number of warrants issued of [*sic*] the same five-year period at issue. Furthermore, all of the specific circumstances of each incident have not been verified and disclosed. Significantly, Plaintiffs have not provided evidence as to the resolution of these claims. Without such information, mere evidence that

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[13] Because there were outstanding discovery issues at the time Plaintiffs opposed Defendants' Motion for Summary Judgment, the Court requested that the Parties submit supplemental briefing on the status of such issues, and how they impacted the Parties' ability to move for and oppose summary judgment. In their supplemental briefing, Plaintiffs note that, since the time they filed their Opposition, they have received additional discovery in the form of Search Warrant Service Packages. Thus, in their supplemental brief, Plaintiffs submit additional argument based on the newly discovered evidence.

claims were made is meaningless and unpersuasive. Nevertheless, because there is outstanding discovery, which Plaintiffs contend will support their *Monell* claims, this court defers its ruling on these claims until discovery is complete. Defendants are hereby ordered to provide forthwith whatever outstanding, responsive evidence they can locate with due diligence.

### 3. Whether Sheriff Baca is a Proper Defendant

Defendants argue that Sheriff Baca is not a proper Defendant, because Plaintiffs' claim against him in his official capacity is redundant of their claim against the County. In support of their argument, Municipal Defendants rely on *Robinette v. Barnes,* in which the court dismissed an official because there was no procedural or remedial advantage to the plaintiff. 854 F.2d 909, 911 n.1 (6th Cir. 1988). This Court agrees with Defendants that Plaintiffs' claims against Sheriff Baca are superfluous. Therefore, Municipal Defendants' Motion for Summary Judgment on Plaintiffs' claim against Defendant Baca is granted.

## H. Count Three – Violation of the 14th Amendment/42 U.S.C. § 1985(3)

Municipal Defendants move for summary judgment on Count Three, brought against all Defendants. They argue that it creates confusion, because

although they appear to be asserting a "conspiracy" claim under 42 U.S.C. § 1985(3), Plaintiffs assert in the body of the count that "each police officer defendant is liable to Plaintiffs under 42 U.S.C. 1981, 1982, and 1985." (Complaint ¶ 26). Still later in the same paragraph, Plaintiffs further allege that all Defendants are liable "pursuant to 42 U.S.C. 1986." (*Id.*) Defendants contend that, regardless of what Plaintiffs are actually attempting to allege, they cannot maintain their claims under any of the cited code sections.

### 1. Plaintiffs' Claim for Conspiracy Under 42 U.S.C. § 1985(3)

To state a claim for violation of 42 U.S.C. § 1985(3), a plaintiff must allege and prove the following four elements:

> (1) a conspiracy; (2) for the purpose of depriving, either directly or indirectly any person or class of persons of the equal protection of the laws, or of the equal privileges and immunities under the laws; and (3) act in furtherance of the conspiracy; (4) whereby a person is either injured in his person or property or deprived of any right or privilege of a citizen of the United States.

*United Bhd. of Carpenters & Joiners, Local 610 v. Scott,* 463 U.S. 825, 828-29 (1983). Furthermore, a claim under § 1985(3) can only be maintained if there is "some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the

conspirators' action." *Id.* at 834 (quoting *Griffin v. Breckenridge,* 403 U.S. 88, 102-103 (1971)).

To prove a "conspiracy" under § 1985, "the plaintiff must show an agreement or meeting of the minds by the defendants to violate his constitutional rights." *Caldeira v. County of Kauai,* 866 F.2d 1175, 1181 (9th Cir. 1989), *cert. denied,* 493 U.S. 817 (1989). "[E]ach participant must at least share the common objective of the conspiracy." *United Steel Workers of Am. V. Phelps Dodge,* 865 F.2d 1539, 1541 (9th Cir. 1989). "A mere allegation of conspiracy without factual specificity is insufficient." *Karim-Panahi v. Los Angeles Police Dept.,* 839 F.2d 621, 625 (9th Cir. 1988).

Defendants argue that Plaintiffs set forth no specific facts or evidence that Defendants' alleged actions were racially motivated or class-based. Defendants, on the other hand, point to the testimony of Walker and Messerschmidt that the preparation and execution of the search warrant had nothing to do with the Millenders' race. (Messerschmidt Decl. ¶ 39; Walker Decl. ¶ 22). Similarly, Plaintiffs have provided no evidence of a "conspiracy," a "meeting of the minds," or any act "in furtherance of the conspiracy."

In Opposition to Defendants' Motion, Plaintiffs contend that: (1) Defendants' failure to provide timely discovery responses has impacted Plaintiffs' ability to oppose the Motion; (2) Regardless of discovery issues, Plaintiffs have a list of personnel complaints provided by Defendants, which includes 15 complaints, many of which directly mention racial discrimination; and

(3) this was not your typical police misconduct case in which police come upon a suspect without any previous contact. (Plaintiff's Opp. to MD's MSJ at 6:19-8:4).

Because of the discovery issues complained of, Plaintiffs have submitted supplemental briefing since the filing of their Opposition. In that Supplemental Briefing, Plaintiffs acknowledge that Defendants have provided 73, out of a supposed 90, claims dating between 11/16/98 and 10/9/03 and alleging wrongful search and/or entry. (Plaintiffs' Supp. Brief at 10:4-16). Plaintiffs note that, among these, "2 specifically allege race discrimination; 2 allege retaliation for not allowing sheriffs into the house because they don't have a warrant; and 1 alleges retaliation for having previously filed a lawsuit against the Sheriff's Department." (Koerner Decl. ¶ 19). As to the 15 personnel complaints Plaintiff already had, claims include "traffic citation," "traffic citation/discrimination," "traffic stop," improper search," "racial profiling," "improper detention," "use of force," etc. Plaintiffs contend that there are "clearly" complaints of overt racial discrimination and that others, if probed further, would most likely include racial discrimination a [sic] well. By the Court's count, one of the claims includes a specific reference to race in the actual "title" of the Complaint (racial profiling), and one more specifically mentions discrimination (traffic citation/discrimination). This list appears to include complaints against the 27 originally named Individual Defendants for a period of at least 1999 through November 2003. (Cook Decl. Exh. LL).

Plaintiffs appear to be arguing that they are part of a protected class in that they are African-American. (Complaint ¶ 26). They may even be arguing that they are protected in the sense that they are being retaliated against because a family member filed and won a lawsuit against the LASD and/or they would not let the officers search their home without a warrant. This is unclear, because Plaintiffs do not specifically state any information about the "protected class" in their Opposition. Rather, the Court has made these assumption [sic] based on Plaintiffs' discussion of the claims and lawsuits against Defendants. Plaintiffs make no link, however, between these claims and any actions taken against Plaintiffs. This Court agrees with Defendants that Plaintiffs have made no specific allegations as to how Defendants conspired together and have submitted no evidence that any actions they took were based on race or other "membership" in a protected class.

In their Opposition, Plaintiffs' appear to be arguing that the "conspiracy" is based on the following facts: (1) Messershcmidt worked up his case for a couple of weeks; (2) several people looked at his affidavit; (3) Messerschmidt asked around and was informed that the Millender Residence was a "problem" house; (4) the entry team met a [sic] the Millender residence the day before the search and spoke with Mrs. Millender and Brenda; (5) according to Mrs. Millender (but disputed by Defendants), deputies asked if they could come in to her house, she said only with a warrant, and they laughed; and (6) after

meeting with the Millenders, Defendants spent the day planning how they would serve the warrant knowing they would have the opportunity to teach Mrs. Millender a lesson for her failure to cooperate. Plaintiffs do not cite evidence in support of any of these statements.

Plaintiffs cannot rely merely on the fact that they are African American and that Defendants planned for and executed a search of their residence. Thus, Plaintiffs have provided no evidence whatsoever of any racial or other class-based motivations, a conspiracy, or any acts in furtherance of a conspiracy. Considering the evidence presented in the light most favorable to Plaintiffs, this Court finds that Plaintiffs have not presented evidence sufficient to create a genuine issue of material fact and grants Defendants' Motion for Summary Judgment on Plaintiffs claim under 42 U.S.C. § 1985(3).

### 2. Plaintiffs' Claim Under 42 U.S.C. § 1981

Count Three also states that "each police officer defendant is liable to Plaintiffs under 42 U.S.C. 1981. . . ." (Complaint ¶ 26). Section 1981 provides in relevant part:

> All persons within the jurisdiction of the United States shall have the same right in every State and territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of

> all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. § 1981 (West 2003). "An important purpose of section 1981 is to eliminate race based interference with the right of each citizen to contract." *Imagineering, Inc. v. Kiewit Pacific Co.*, 976 F.2d 1303, 1318 (9th Cir. 1992). Plaintiffs make no allegations in this regard. Furthermore, Plaintiffs do not specifically oppose Defendants Motion in this regard. Accordingly, this Court grants Defendants' Motion for Summary Judgment on Plaintiffs' claim under 42 U.S.C. § 1981.

### 3. Plaintiffs' Claim Under 42 U.S.C. § 1982

Count Three also states that "each police officer defendants [sic] is liable to Plaintiffs under 42 U.S.C. . . . 1982. . . ." (Complaint ¶ 26). Section 1982 provides that: "All citizens of the united States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property." 42 U.S.C. § 1982 (West 2003).

"Racial discrimination must be shown to state a colorable Section 1982 claim." *W. Coast Theater Corp. v. City of Portland*, 897 F.2d 1519, 1527 (9th Cir. 1990). Conclusory allegations and/or unwarranted inferences are insufficient. *Sprewell v. Golden State*

*Warriors,* 266 F.3d 979, 988 (9th Cir. 2001). Defendants move this Court for Summary Judgment on this claim, because Plaintiffs make no allegations whatsoever regarding their right to "inherit, purchase, lease, sell, hold, and convey real and personal property." Furthermore, Plaintiffs do not specifically oppose Defendants Motion in this regard. Accordingly, this Court grants Defendants' Motion for Summary Judgment on Plaintiffs' claim under 42 U.S.C. § 1982.

**4. Plaintiffs' Claim Under 42 U.S.C. § 1986**

Finally, Plaintiffs' Count Three states that "any governmental any [sic] supervisorial police defendant who had the power to but who did not prevent the violations of § 1985 are liable to each plaintiff pursuant to 42 U.S.C. 1986." (Complaint ¶ 26). Section 1986 provides that:

> Every person who, having knowledge that any of the wrongs conspired to be done are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured. . . .

42 U.S.C. § 1986 (West 2003). A conspiracy under 42 U.S.C. § 1985 is a prerequisite to a valid claim under Section 1986. *See Karim-Panahi,* 839 F.2d at 625.

Defendants move for summary judgment on the ground that Plaintiffs cannot establish a claim for

conspiracy under Section 1985. This Court has considered Plaintiffs' arguments and evidence in support of their Section 1985 claim and found them unconvincing. Because this Court has granted Defendants' Motion for Summary Judgment on the Section 1985(3) conspiracy claim, Plaintiffs cannot maintain their Section 1986 claim. Accordingly, Defendants' Motion for Summary Judgment on such claim is granted.

## I. Count Four – Violation of California Constitution, Article I, §§ 1, 7 and 13

Plaintiffs bring a claim for violation of California Constitution Article I, §§ 1, 7 and 13[14] against the

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[14] Article I, § 1 of the California Constitution reads:

"All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness and privacy.

Article I, § 7 of the California Constitution states in pertinent part that:

> (a) A person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws . . .
>
> (b) A citizen or class of citizens may not be granted privileges or immunities not granted on the same terms to all citizens. . . .

Article I, § 13 provides that: "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable seizures and searches may not be violated; and a warrant may not issue except on probable cause, supported by oath or affirmation, articularly [sic] describing the place to be searched and the persons and things to be seized.

County of Los Angeles only. Municipal Defendants move for summary judgment on this claim on two grounds.

First, Municipal Defendants argue that, to the extent Plaintiffs seek to maintain their claims for damages directly under the California Constitution rather than an enabling statute, such as Civil Code section 52.1, such claims must fail, because an action for monetary damages is not available. Plaintiffs respond that all provisions of the California Constitution are self-executing and, therefore, support claims for declaratory relief or injunction. *Katzberg v. Regents of the University of California*, 29 Cal. 4th 300, 306 (2002). Thus, *Katzberg* establishes a framework for determining the relevant question – whether money damages are available under the specific constitutional provision at issue for the specific wrong alleged. Under such framework, a court considering this question must first "look at the language and history of the provision for an affirmative intent to authorize a claim for damages." *Reinhardt v. Santa Clara County*, 2006 WL 662741, *8 (N.D. Cal.) (applying *Katzberg*, 29 cal. 4th at 317). Where there is no such affirmative intent, the court must consider whether an adequate remedy exists, the extent to which a constitutional tort action would change established tort law, and the nature and significance of the constitutional provision." *Id.* Finally, "if these factors weigh against the recognition of a right to damages, the inquiry ends. If, however, the factors weigh in favor of recognizing such a right, the court

should also consider any special factors counseling hesitation in recognizing a damages action." *Id.*

As to Article I, § 7, the *Katzberg* court found that this section did not manifest an intent to create an independent damages remedy, and that alternative remedies were available under Cal. Civ. Code § 52.1 and 42 U.S.C. § 1983. 29 Cal. 4th at 318-24. Likewise, this Court finds that such alternative remedies are available and that Plaintiffs have, in fact, brought claims under § 1983 and California Civil Code § 52.1. Therefore, Municipal Defendants are entitled to summary judgment on Plaintiffs' claim under California Constitution Article I, § 7.

Plaintiffs' Count Four, however, also alleges violations of California Constitution Article I, §§ 1 & 13. The California Supreme Court has held that a plaintiff can bring a private action for injunctions under Article I, Section 1 for alleged violations of privacy. *Hill v. Nat'l Collegiate Athletic Assoc.*, 7 Cal. 4th 1, 8, 20 (1994). However, no California state court has ruled on this issue and neither has the Ninth Circuit. This Court notes, however, that Judge Phillips of the Central District of California has addressed this question, and the question as it relates to Article I, § 13. *Smith v. County of Riverside,* No. EDCV 05-00512 VAP, at *16-18 (C.D. Cal. May 16 2006). While the *Smith* opinion is not binding on this Court, Judge Phillips reasoning is persuasive and applies to the facts of this case.

As to Article I, § 1, Plaintiffs have provided no reason as to why this Court should allow an action for monetary damages.[15] Furthermore, as with Plaintiffs Article I, § 7 claim, alternative remedies are available to Plaintiffs under Cal. Civil Code § 52.1 and 42 U.S.C. § 1983. Allowing Plaintiffs to sue for money damages for an alleged state constitutional privacy violation would create a new cause of action, altering established tort law in California. Therefore, the Court grants Defendants' Motion for Summary Judgment in regard to Plaintiffs' claims for violation of the California Constitution, Article I, § 1.

Finally, the Court must consider Plaintiffs' claims under Article I, § 13. As Plaintiffs point out, the *Katzberg* court specifically differentiated the rights flowing to a victim of an illegal search and seizure from the remedies available under a due process liberty rights violation. 29 Cal. 4th at 321-24. Relying on an opinion from the New York Court of Appeals, the California Supreme Court in *Katzberg* stated that there was "historical support for an implied remedy in damages" in the English common law. *Id.* at 322 (quoting *Brown v. New York*, 674 N.E. 2d 1129, 1139 (1996)). Thus, the *Katzberg* court noted that its holding that no damages remedy was available under Article I, § 7 was based in part on the lack of evidence as to any "similar history with respect to the liberty

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[15] Plaintiffs contend that, in *Porten v. Univ. of San Francisco*, the court held that Article I, Section 1, supported an action for money damages. However, this Court does not agree.

interest," indicating that he would have found a damages remedy under Article I, § 13. 29 Cal. 4th at 323. In the absence of an actual California Supreme Court decision, this Court Must apply the law as we believe the California Supreme Court would apply it." *Astaire v. Best Film & Video Corp.*, 116 F.3d 1297, 1300 (9th Cir. 1997).

Therefore, this Court finds that Plaintiffs are entitled to assert a claim for monetary damages under Article I, § 13 of the California Constitution. Accordingly, Defendants' Motion for Summary Judgment on Plaintiffs' Count Four is denied as it relates to Article I, § 13.

Because Plaintiffs' claim for violation of California Constitution, Article I, § 13, remains, this Court must address Defendants' second argument. Municipal Defendants argue that Plaintiffs' claim under the California Constitution is based on the very same allegations as are Counts One and Two under the Federal Constitution and Section 1983. Specifically, the common allegations are that Defendants allegedly "interfere[d] with Plaintiffs' rights to be free from unreasonable invasions of their privacy and unreasonable search and seizure and to be accorded due process." (Complaint ¶¶ 24, 25 & 27). Thus, Municipal Defendants argue that, because the claims are the same, the analysis is the same and "[j]ust as defendants did not violate plaintiffs' federal constitutional rights, so too was there no violation of state constitutional rights."

Plaintiffs generally agree with Defendants, but make the opposite argument – that because Plaintiffs have stated constitutional violations under the Fourth and Fourteenth Amendments, so to [sic] have they stated claims under the California Constitution. Additionally, Plaintiffs assert that the protections of the California Constitution are broader than the United States Constitution. *People v. Brisendine,* 13 Cal. 3d 528 (1975). However, they make no argument as to how, if true, this should impact the Court's analysis. Therefore, this Court interprets this as an agreement by the Parties' that the Court's findings on the probable cause and unreasonable search and seizure claims in regard to the federal constitutional claims should apply equally to the state claims.

### J. Count Five – Violation of Civil Code Section 52.1(b)

In Count Five of their Complaint, Plaintiffs assert a claim for violation of Civil Code Section 52.1(b) against the County of Los Angeles only. Section 52.1(b) provides in pertinent part:

> Any individual whose exercise or enjoyment of rights secured by the Constitution or laws of the United states, or of rights secured by the Constitution or laws of this state, has been interfered with, as described in subdivision(a), may institute and prosecute

> in his or her own name and on his or her own behalf a civil action for damages. . . .

Cal. Civil Code § 52.1(b) (West Supp. 2007). Thus, when read in conjunction with Section 52.1(a), Plaintiffs constitutional rights must have been interfered with "by threats, intimidation, or coercion." *See* Cal. Civil Code § 52.1(a). (West Supp. 2007).

Defendants move for summary judgment on this claim. In support of their Motion, Defendants argue that none of Plaintiffs' constitutional rights were interfered with by the County of Los Angeles. Similarly, Plaintiffs move for summary adjudication on the issue of whether Defendants are liable under *respondeat superior*.

Plaintiffs argue that Individual Defendants violated their constitutional rights. Thus, Plaintiffs claim that the County is liable for such violations under the doctrine of *respondeat superior*. Plaintiffs are correct that, under California law, the county may be liable for the Individual Defendants' interference with Plaintiffs' constitutional rights by threats, intimidation, or coercion under the doctrine of *respondeat superior*. *See Venegas v. County of Los Angeles*, 32 Cal. 4th 820, 843 (2004). Furthermore, this Court has found that genuine issues of material fact exist as to whether various Individual Defendants committed certain constitutional violations. Accordingly, Municipal Defendants' Motion for Summary Judgment on Plaintiffs' claim for violation of Section 52.1(b) is denied. However, while this Court concludes that the

doctrine of *respondeat superior* is applicable *if constitutional violations are proven*, this Court cannot at this time determine that, as a matter of law, Defendants are liable under the doctrine and entitled to relief under California Civil Code § 52.1. Therefore, Plaintiffs' Motion for Summary Adjudication is also denied.

### K. Count Six – Violation of Civil Code Section 51.7

In Count Six of their Complaint, Plaintiffs assert a claim for violation of California Civil Code Section 51.7 against the County of Los Angeles only. Section 51.7 provides in relevant part:

> (a) All persons within the jurisdiction of this state have the right to be free from any violence, or intimidation by threat of violence, committed against their persons or property because of political affiliation, or on account of any characteristic listed or defined in subdivision (b) or (e) of Section 51, or position in a labor dispute, or because another person perceives them to have one or more of those characteristics. The identification in this subdivision of particular bases of discrimination is illustrative rather than restrictive.

Cal. Civil Code § 51.7 (West Supp. 2007). Subdivisions (b) and (e) of Section 51 list the characteristics as "sex, race, color, religion, ancestry, national origin, disability, medical condition, marital status, or sexual

orientation. Cal. Civil Code §§ 51(b) & (e) (West Supp. 2007).

Municipal Defendants move for summary judgment on this claim on the grounds that Plaintiffs' allegation of "invidious racial animus," (Complaint ¶ 29), are entirely unsupported. Specifically, Defendants claim that Plaintiffs present no evidence that they were subject to any violence, or threat of violence, because of their race. Plaintiffs respond with the argument that they were unable to prepare adequately enough to oppose a motion on this issue due to Defendants' failure to provide discovery.

As this Court previously discussed in regards to Plaintiffs' claim for conspiracy under 42 U.S.C. § 1985(3), Plaintiffs' argument must fail. At the Court's request, Plaintiffs submitted supplemental briefing on the status of outstanding discovery and its impact on their ability to move for or oppose summary judgment.

In such briefing, Plaintiffs set forth further evidence that Defendants had provided through discovery. That evidence and its application to Plaintiff's "racial animus" claims is discussed in greater detail in regard to Plaintiffs' 42 U.S.C. § 1985(3) claim. Such evidence, however, does not create a triable issue of fact on this issue. Furthermore, Plaintiffs only remaining issue with discovery is that Defendants have not provided *all of the responsive* documents, claims, etc. Thus, if and when Defendants further comply, Plaintiffs will simply receive more

personnel complaints, claims, etc. in regard to the department as a whole. Such claims are not final judgments and can not establish that Individual Defendants acted in a racially discriminatory manner. Plaintiffs do not argue that they are awaiting discovery on anything else, which would bear on these claims. Furthermore, as the Court discussed earlier, Plaintiffs have provided no specific allegations or evidence regarding racial animus on the part of these particular Individual Defendants. Accordingly, Defendants' Motion for Summary Judgment on Plaintiff's claim for violation of California Civil Code § 51.7 is granted.

### L. Count Seven – Negligence (Civil Code § 1714)

In Count Seven of their Complaint, Plaintiffs assert a claim for negligence against the County of Los Angeles only. (Complaint ¶¶ 30 & 31). Defendants move for summary judgment on the negligence claim on the grounds that the County is immune pursuant to California Government Code § 815. Section 815 provides that "[e]xcept as otherwise provided by statute, a public entity is not liable for an injury, whether such injury arises out of an act or omission of the public entity or a public employee or any other person." California Government Code § 815 (West 1995). In response, Plaintiffs argue that the County is, in fact, liable under the doctrine of *respondeat superior.*

At the outset, the Court notes the confusion among the Parties as to what is actually alleged. Defendants correctly argue that the County cannot be held directly liable for its own acts or omissions, because it is immune under Section 815. However, in their Opposition, Plaintiffs concede that they are not claiming that the County is directly liable for negligence. Rather, Plaintiffs contend, pursuant to California Government Code § 815.2, that the County is liable for the negligence of its employees based on the theory of *respondeat superior*. Section 815.2 provides that:

> a public entity is liable for injury proximately caused by an act or omission of an employee of the public entity within the scope of his employment if the act or omission would, apart from this section, have given rise to a cause of action against that employee or his personal representative."

California Government Code § 815.2 (West 1995). Thus, Plaintiffs claim that the County is liable for the negligent acts or omissions of its employees, such as detaining and threatening to use force against Plaintiffs and for their negligent hiring, training, supervision and discipline of other employees of the County.

Accordingly, Municipal Defendants' Motion for Summary Judgment as to Count Seven is denied, on the grounds that they have not properly challenged Plaintiffs' claims under Government Code § 815.2. However, this Court notes that, should Plaintiffs have any intention of asserting a claim of direct negligence

against the County, they are precluded from doing so as a matter of law pursuant to Government Code § 815.

### M. Eleventh Amendment Immunity

The Municipal Defendants' final argument is that they are absolutely immune from tort liability under the Federal Civil Rights Act. Specifically, Municipal Defendants argue that, based on the California Supreme Court's holding in *Venegas v. County of Los Angeles,* the Sheriff's Department and Sheriff Baca were acting on behalf of the State of California while conducting criminal investigations and performing law enforcement activities. 32 Cal. 4th 820 (2004). The *Venegas* court held that "sheriffs act on behalf of the state when performing law enforcement activities," such that, "when acting in their law enforcement roles, California sheriffs are . . . absolutely immune from prosecution for asserted violations of [42 U.S.C. § 1983]." *Id.* at 826.

This Court agrees with Plaintiffs, however, that "[q]uestions regarding section 1983 liability implicate federal, not state law." *Brewster v. Shasta County,* 275 F.3d 803, 811 (9th Cir. 2001). The Ninth Circuit has specifically held that, "[a]lthough we must consider the state's legal characterization of the government entities which are parties to these actions, federal law provides the rule of decision in section 1983 actions." *Streit v. County of Los Angeles,* 236 F.3d 552, 560 (9th Cir. 2001). Based on *Streit,* LASD and Sheriff Baca

are not arms of the state and are not entitled to Eleventh Amendment immunity. Accordingly, Municipal Defendants' Motion for Summary Judgment in this regard is denied. However, to the extent that this Court has already granted Municipal Defendants' Summary Judgment on Plaintiffs *Monell* claims, this issue is moot.

## V. Conclusion

For all the foregoing reasons, this Court (1) Grants in part and denies in part Plaintiffs' Notice of Motion and Motion for Summary Adjudication; (2) Grants in part and denies in part Individual Defendants' Notice of Motion and Motion for Summary Judgment and/or Summary Adjudication of Issues; and (3) Grants in part and denies in part Municipal Defendants' Notice of Motion and Motion for Summary Judgment or, in the Alternative, for Summary Adjudication. The Court defers its ruling on Municipal Defendants' Motion as it relates to Plaintiffs' *Monell* claims until discovery is complete. Defendants are hereby ordered to provide forthwith all outstanding, responsive discovery they can locate with due diligence.

The Court sets a status conference for 11:00 a.m. on Monday, March 26, 2007 to discuss the status of discovery and possible bifurcation of Plaintiffs' *Monell* claims.

IT IS SO ORDERED.

Dated: _____

_____
DEAN D. PREGERSON
United States District Judge

# OPPOSITION BRIEF

No. 10 - 704

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IN THE
SUPREME COURT OF THE UNITED STATES

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CURT MESSERSCHMIDT and
ROBERT J. LAWRENCE,

*Petitioners,*

vs.

AUGUSTA MILLENDER,
BRENDA MILLENDER, and WILLIAM JOHNSON.

*Respondents.*

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*On Petition for Writ of Certiorari*
*to the United States Court of Appeals*
*for the Ninth Circuit*

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# BRIEF IN OPPOSITION

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## QUESTIONS PRESENTED

1. Whether the standard for civil liability should be different than the standard for suppressing evidence in a criminal case?

2. Whether public entities should be responsible, under the doctrine of *respondeat superior*, for the acts of their agents?

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## STATEMENT OF THE CASE

*Millender v. County of Los Angeles*, 820 F.3d 1016 (9th Cir. 2010) (*en banc*) correctly resolved the sometimes arguable questions which arise in deciding whether an affidavit is so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable. No significant conflicts have developed among the federal or state courts in the twenty-five years since *United States v. Leon*, 468 U.S. 897 (1984) and *Malley v. Briggs*, 475 U.S. 335 (1986). In short, the standards of Rule 10 have not been met and this petition should be denied.

Moreover, Petitioners' shotgun-array of arguments were not properly raised in the courts below.

*Millender* arises out of a qualified immunity appeal after cross motions for summary adjudication. At issue was a November 4, 2003, warrant obtained by Curt Messerschmidt and approved by Robert J. Lawrence regarding a suspect named Jerry Lee Bowen, and the way Defendants executed the warrant. The Millenders contended that the warrant was invalid because the affiant, Messerschmidt, had misled the magistrate by including false representations and omitting material facts, and because, on its face, the affidavit did not establish probable cause. Also in dispute was whether the Defendants' "SWAT" team's terrifying nighttime entry was lawful.

Rejecting the Millenders' primary contentions, the district court on March 15, 2007, ruled that the

affidavit, on it face, established probable cause to believe that Bowen resided at the Millenders' home and that Messerschmidt had not misled the magistrate. App.[1]131-147. In doing so, the court determined that Defendants were not bound by a prior Los Angeles County Superior Court determination that the affidavit, on its face, did not establish probable cause to believe that Bowen would be found at the Millenders' home. App.129.

The district court did accept some of the Millenders' contentions that the affidavit was overly broad, *i.e.*, that the warrant improperly authorized the seizure of Mrs. Millender's legally-owned black 12-gauge "Mossberg" shotgun with a wooden stock, and a box of .45 caliber "American Eagle" ammunition, and improperly authorized the search for "gang-related" items. (With regard to the entry, the court found that the parties' claims could not be resolved on summary adjudication because of disputed facts.)

Messerschmidt and Lawrence appealed the denial of qualified immunity. The Millenders unsuccessfully attempted to appeal the district court's rejection of their contentions, including the finding that the affidavit established probable cause to believe Bowen would be found in their home and that Messerschmidt had not misled the magistrate. The Millenders' application for certification of the order for interlocutory appeal was denied. AER[2] 1887 [docket

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[1] "App." refers to the Petitioners' appendix.

[2] "AER" refers to Appellants' Excerpts of Record filed by Petitioners in the Ninth Circuit.

entry #114]. Consequently, the only issues before the Ninth Circuit concerned those portions of the warrant which the district court found overly broad.

The Court of Appeals correctly determined, App. 25, that it was clearly established that whether there is probable cause must be determined by what is in the affidavit. *Aguilar v. Texas*, 378 U.S. 108, 109 n. 1 (1964) ("It is elementary that in passing on the validity of a warrant, the reviewing court may consider only information brought to the magistrate's attention."), overruled on other grounds by *Illinois v. Gates*, 462 U.S. 213, 238 (1983); *Crowe v. County of San Diego*, 593 F.3d 841, 869 (9th Cir. 2010).

A corollary to this axiom is that "[t]he scope of the warrant, and the search, is limited by the extent of the probable cause," and that "probable cause must exist to seize all the items of a particular type described in the warrant." *In re Grand Jury Subpoenas*, 926 F.2d 847, 857 (9th Cir 1991); App.14-15, 22. Consequently the court correctly found that:

> "The affidavit indicated exactly what item was evidence of a crime, the black sawed-off shotgun with a pistol grip, and reasonable officers would know they could not undertake a general, exploratory search for unrelated items unless they had additional probable cause for those items."

App.35.

The Ninth Circuit also agreed that there was no probable cause to search for "gang-related" items:

> Messerschmidt himself stated he had no reason to believe that Bowen's assault on Kelly was related to gangs, and there is no evidence in the affidavit (or the record) to suggest otherwise. Because the deputies failed to establish any link between gang-related materials and a crime, the warrant authorizing the search and seizure of all gang-related evidence is likewise invalid.

App.29.

## FACTS

### *a. The Millenders and Their Connection to Bowen.*

Seventy-three-year-old Augusta Millender (Mrs. Millender), the widowed matriarch of a large family ("the Millenders"), including five children, eighteen grandchildren, and eleven great grandchildren, served, many years earlier, as a foster parent for several children, one of whom was Jerry Lee Bowen.

Mrs. Millender is and was in poor health, with diabetes and very high blood pressure. **AER 118** (A.M. 106:14-25). She also has metal pins in her femur and uses a walker. **App.108-09**. (Because of her health, delays in this litigation substantially increase the probability she will die before it is resolved.)

The Millenders do not now and have never claimed there was not probable cause to arrest Bowen; obviously Bowen should have been arrested, sooner rather than later. The misconduct of which the Millenders complain prevented that from occurring.

The Millenders were in no way responsible for Bowen. They are the entirely innocent victims of Defendants' poor police work.

Although it would make no difference if she were Bowen's natural mother, *Poolaw v. Marcantel*, 565 F.3d 721, 730 (10th Cir. 2009) ("we discern a clear rule: A familial relationship to someone suspected of criminal activity, without more, does not constitute probable cause to search or arrest"), Mrs. Millender was no longer even Bowen's "foster" mother. Bowen was thirty-four, **AER 857** (Messerschmidt 37:22-24), married, and had not "resided" in the Millenders' home for more than a decade. **AER 800-803** (A.M. 81:7-20, 85:15-87:14).

Mrs. Millender owned and lived in a very nicely kept family home she and her late husband had built over fifty years earlier. **AER 533-538** (photos of the Millenders' home); **AER 574-576** (defendants' pre-search aerial photos). Before this incident drove them away, Mrs. Millender's daughter and co-plaintiff, Brenda Millender (Brenda) and Brenda's son and co-plaintiff, William Johnson (William), lived there, too. There was a back house in which Mrs. Millenders' adult son Willie (who was arrested on a misdemeanor drug charge as a result of the search) lived.

Neither Mrs. Millender, nor her daughter and grandson were "criminals" or "gang" members. William was the music director at his church, a full-time student, and worked part-time as a care provider for people with disabilities, and was only 20 years old. App. 109. Brenda was 47, with high blood pressure and insulin-dependant diabetes. No plaintiff remotely resembled 34-year-old Bowen.

As Petitioners correctly explain, County of Los Angeles Sheriff's Department deputies were looking for Bowen, AER 857 (Messerschmidt 37:22-24), who had assaulted his live-in girl friend, Shelly Kelly, as a result of her decision to terminate their relationship and move out of the apartment they had shared (at 1425 West 97th Street, Los Angeles) for about six months. Bowen was also married, but not to Kelly.

The deputies were also searching for a black, sawed-off shotgun with a pistol grip which Bowen retrieved from their apartment during the assault and fired toward Kelly. Kelly gave Messerschmidt a photograph of Bowen holding the weapon. App.20.

Bowen's connection to the Millenders was this: Mrs. Millender was Bowen's foster mother when he was 13-18. years old. Then, for about two months in spring of 2003, Bowen temporarily stayed at the Millenders' back house. (He had apparently been ordered out of his home due to a spousal abuse charge involving his wife. See AER 584.) After leaving the Millenders, Bowen and Kelly moved into the apartment at 1425 West 97th Street, Los Angeles. App.109.

In June 2003, after Bowen had left the Millenders and moved in with Kelly, a State of California social services agency sent a letter for Bowen to the Millenders' address. Bowen never got it. Five months later, during the November 6, 2003, search, Defendants found it. This one letter was the only indication that Bowen had any connection to the Millenders. **AER 79 (12:14-17).** There was no indication Bowen lived in the Millenders' home, or intended to return.

*b.* ***Messerschmidt's "Determination" That Bowen Lived at the Millenders' Address.***

Attempting to locate Bowen, Messerschmidt interviewed Kelly, on video tape:

> Mess.: So he's staying at this 120th —
>
> Kelly: ***I believe so. If I'm not mistaken. I believe that's where he's hiding out at.***
>
> Mess.: And you said that's his . . .
>
> Kelly: His foster mother's house.

**AER 565** (19:11-15) (Italics added); see also **AER 71** (4:20-21); **AER 860-861** (Messerschmidt 48:23–54:12).

Kelly also gave Messerschmidt a traffic citation with Bowen's address on it. Messerschmidt said he lost the citation and could not remember what address was

on it. AER 72 (5:18-21).

That was the totality of Messerschmidt's information from Kelly about Bowen's whereabouts. Messerschmidt never asked *why* Kelly thought Bowen was "hiding out" at the Millenders'; never asked *where* she got her information; never asked *when* she got it; and never asked if it was based on her own personal knowledge or what someone else told her. AER 860-861 (Messerschmidt 48:23–54:12).[3]

In short, Defendants did not attempt to determine why an apparently law-abiding 73-year-woman would be "hiding out" a foster child of twenty years earlier, and his sawed-off shotgun, and whatever other weapons he might conceivably have, as well as "articles of evidence of street gang membership or affiliation with any street gang," in her meticulously-kept family home.

According to his affidavit, Messerschmit also searched "departmental records, state computer records and other police agency records" and claimed to have "determined" that Bowen "resided" at plaintiffs'

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[3] Although not in his affidavit, nor documented in any report, Messerschmidt later claimed Kelly told him she had been to the Millenders with Bowen, at some unidentified time, "prior to the assault." AER 860 (Messerschmidt 52:6-9). Although Messerschmidt claimed he documented everything important, Kelly's alleged statement was not documented anywhere. AER 859-860 (Messerschmidt 48:7-12, 52:10-13). Even if true, Messerschmidt's claim is not helpful to Defendants, because he never found out *when* Bowen had visited the Millenders and visiting someone's home does not make it your residence.

home. **AER 639** (Affidavit 3:11-25). In this critical regard, Defendants' affidavit is "bare bones." It does not say what records were searched or what the records in fact showed.

As noted above, as a result of the search, Willie, a son living in the back house, was charged with a misdemeanor. At the request of Willie's public defender, after an evidentiary hearing at which Messerschmidt testified, **AER 864, 882** (Messerschmidt 68:1-3, 138:15–139:6), the court quashed the warrant because the affidavit on its face did not establish probable cause to believe Bowen would be found at the Millenders', and the case was dismissed. **AER 770-772** (RT 75:6-77:14).

The Superior Court judge, who presumably understood California "police agency records," found Messerschmidt's reference to unidentified police records inadequate: "It doesn't say anything. . . . It doesn't name the records or what they were, or what he found out about them; 'state computer records,' that's a generic term for – it could be whatever, who knows what he had checked, if anything, 'and other police agency records.' That tells me nothing, . . .. It looks very impressive, but it doesn't say anything. . . . That paragraph is useless." **AER 770** (RT 75:17–76:1).

The Superior Court was right. Messerschmidt's unequivocal representation that the police records "confirmed" that Bowen "resided" at 2234 E. 120th Street, Pet. 4, **AER 639** (affidavit), was far from accurate.

As even Messerschmidt acknowledged, **AER 862-63** (Messerschmidt 58:6–64:18), according to all the police records he reviewed, Bowen's most recent address was 1425 W 97th Street, not the Millenders. The DMV records last mentioned the Millenders' address eight months earlier, in March. **AER 592** (DMV record). The other records (CLETS and CCHRS) only confirmed that Bowen had last been associated with the Millenders' address in May, almost six months before Defendants and their SWAT team broke into the Millenders' home at night. Moreover, the records also showed that in May, at exactly the same time that the Millenders' address turned up, Bowen was reported to be living at another address, 2303 S. Marvin Ave. **AER 584, 590-91** (CLETS and CCHRS reports). The records also showed many other addresses—not the Millenders'—in the many years of Bowen's adulthood.

*c. Defendants' Other Pre-Search Activities.*

Before the search, Defendants "scouted" the Millenders' home. On November 3 & 4, Messerschmidt and other deputies took "drive-by" photographs. **AER 577-578** (photos); **AER 644** (Team Activation Packet (TAP), SEB0005). On November 5, deputies went to the door between 10:00 a.m. and 1:00 p.m. and spoke with Mrs. Millender and Brenda. **AER 922** (Walker 104:8–105:8); **AER 949-951** (Rector 26:22-24, 31:11-33:9); **AER 1004-1005** (Nichiporuk 28:16-32:12). According to Defendants, they did so to alert the Millenders to men "gambling on the street in front of the house." **AER 167** (3:11-15).

According to Mrs. Millender, the deputies asked if Bowen was there and Mrs. Millender said he was not. They then asked if they could search. Mrs. Millender said, yes, if they had a warrant. The deputies just laughed. **AER 788-794, 796-800** (A.M. 66:15-72:20, 74:13-77:3).

In the week before the search, William more than once saw marked cars drive by and slow down. **AER 839-840** (W.M. 35:25-36:11). Deputies once stopped William in the driveway and told him "he fit the description" of someone they were looking for. Another time, deputies walked up the driveway and asked William where he was going. **AER 840-843** (W.M. 36:13-39:8). Deputies once followed William from home and pulled him over, but did not cite him. **AER 844** W.M. 40:5-41:23).

Brenda found deputies searching her Ford Escort in the driveway. They told Brenda only that they were looking for a suspect. **AER 816-824, 826** (Brenda 68:8-12, 68:12-70:5, 70:23-71:24, 72:11-76:5, 78:7-80:2). The next day, deputies were pulling out of the driveway when Brenda wanted to pull in. **AER 825** (Brenda 77:1-12).

Defendants had no information that the Millenders — or anyone in the Millenders' neighborhood — were trying to keep Bowen from being arrested. **AER 1461** (Messerschmidt 146:2–147:7.

Defendants included none of this information in the affidavit. Messerschmidt never even mentioned the Millenders or that 2234 East 120th Street was the

Millenders' home. Messerschmidt's affidavit made in sound like Bowen lived at 12234 East 120th Street alone.

After the Millender fiasco, Messerschmidt put 1425 W 97th Street (where Bowen had lived with Kelly, last known address) under surveillance and asked Kelly if she had any "additional information as to the possible whereabouts of Bowen." Kelly suggested Bowen's mother-in-law's residence and a local motel. Thirty minutes later, during the day, deputies went to the motel, knocked on the door, were admitted by Bowen's wife, and found Bowen hiding under the bed. AER 79-80 (Messerschmidt Dec. 12:24–13:2(Messerschmidt supplemental report 11/19/03).

*d. What the Affidavit Should Have Said.*

The affidavit should have said:

> Kelly informed me that Mrs. Augusta Millender, 73 years old, is Bowen's former foster mother. Kelly told me that she thought Bowen might be "hiding out" at Mrs. Millender's home but added that she might be "mistaken."
>
> Kelly did not tell me why she thought Bowen might be hiding out at the Millenders, nor why she thought she might be mistaken, and I did not ask. Kelly did not tell me whether she came to her conclusions based on what she herself

knew, or based on second hand information, and I did not ask. Kelly did not tell me whether the information she relied on was fresh or dated, and I did not ask. Kelly did not tell me whether or not she thought Mrs. Millender knew that the authorities were looking for Bowen, and I did not ask. Kelly did not tell me who else might be living at the Millenders', and I did not ask. We have no information that Mrs. Millender might know that we are looking for Bowen.

Based on the Department's investigation, I know that the Millenders' home consists of two houses and a large storage shed. From aerial surveillance, it appears the main house has three bedrooms. Property records show the home has been owned by the Millenders for over 50 years. We have confirmed that at least Mrs. Millender, her daughter Brenda and her 20-year-old grandson reside there.

We have no reason to suspect the Millender family of any complicity in the crime we are investigating, nor in any other crime.

We surveilled the location for several days, including going up to the front door and speaking with Mrs. Millender and Brenda. We were unable to

obtain any information that Bowen is there, had recently been there, or intends to be there, or to develop any indication that, if Bowen is there, the Millenders have any knowledge that Bowen is wanted by the authorities.

I checked DMV , Consolidated Criminal History Reporting System ("CCHRS"), and "Calgangs" records. (Calgangs records are never to be used as probable cause of arrest.) According to all the records I reviewed, Bowen's most recent address was 1425 W 97th Street. The DMV records last mentioned the Millenders' address in March, 2003. The other records (CLETS and CCHRS) indicated that Bowen had last been associated with the Millenders' address in May, 2003, approximately five months before Bowen's assault on Kelly. The records also showed that in May, at exactly the same time that the Millenders' address was reported, Bowen was also reported to be living at another address, 2303 S. Marvin. The records go back many years and, other than as indicated above, there is no connection between Bowen and the Millenders' home.

Although Kelly told us and we have reason to believe that Bowen is associated with and possibly a member of the Mona Park Crips, we have no reason

> to believe that this crime of apparent domestic violence is gang related.
>
> Based the foregoing, we seek authorization to enter the Millenders' home at night, using a SWAT team to gain entry, and to search for and seize the items described below, whether or not there appears to be any connection to Bowen.

*e. The Search Warrant.*

The warrant broadly commanded the seizure of four categories of items:

> ✦ *any* firearm and *any* thing related to *any* firearm;
>
> ✦ "articles of evidence showing street gang membership or affiliation with any Street Gang;"
>
> ✦ "any photographs or photograph albums . . . *which may depict evidence of criminal activity*;"
>
> ✦ "articles of personal property tending to establish the identity of person [sic] in control of the premise [sic] or premises."[4]

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[4] Although his affidavit failed to say so, Messerschmidt knew Mrs. Millender was in control of the premises. AER 879-880 (Messerschmidt 128:21–129:16).

AER 634 (Warrant Attachment 2).

*f. The Break In.*

At 5:00 a.m. on November 6, 2003 deputies served the warrant. Walker, the SWAT leader, while on the porch, made an audio tape recording. **AER 988** (Stella 71:17-24); **AER 889** (Walker 8:9-11); **AER 849** (Rector 8:4-9); **AER 1000** (Nichiporuk 9:4-11). As one can hear, a pre-recorded announcement given from the street is incomprehensible and did not even begin until the moment defendants started breaking in. **AER 988** (Stella 72:17-73:25).[5] In three seconds, defendants smashed the large window in the Millenders' living room, **AER 533-538** (photographs), finished breaking in the front door, and entered.[6] As defendants entered, someone yelled, "Sheriff's Department, open the door, we have a warrant." **AER 652-665** (Entry Tape and Partial Transcript).[7]

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[5] The pre-recorded announcement was played from a "vehicle public address system from the northwest corner of the lot." **AER 666-668** (11/06/03 supplemental report). This was over 100 feet from the front door, and even farther from the home's bedrooms. **AER 577-578** (photos from street); **AER 574-576** (aerial photos); **AER 579-582** (Los Angeles County Assessor's Map).

[6] The window smashing begins with "break and rake, break and rake."

[7] The After-Action Report inaccurately states that "several pre-recorded announcements, identifying us as law enforcement officers and describing our intentions to serve a search warrant, were played from a vehicle public address system from the north/west corner of the lot. Several verbal announcements were also made by members of the entry team at the front door of the location. When there was no response from the interior of the

Mrs. Millender, Brenda and William were all asleep. **AER 779** (Mrs. Millender 12:15-17); **AER 811** (Brenda 31:17-20); **AER 832-833** (William 9:21-10:1). None of them had the least chance to open the door before defendants broke it down, smashed the picture window, and entered. Inside, defendants pointed guns at plaintiffs and immediately ordered them outside, in their nightclothes and without shoes. **AER 934** (Walker 139:10:24), **AER 782** (Augusta 47:17-22 (not allowed to get her walker or a sweater)). Plaintiffs were terrified. **AER 806** (Augusta 105:11-16 ("Heard like gun shots going through that glass, coming through my kitchen window through my kitchen. I said, 'Lord, Whoever this is is going to kill us that night.'")). Later that day she was hospitalized, because of extraordinarily high blood pressure. **AER 805** (Augusta 103:8-12 ("When I went to the hospital, I couldn't open my eyes. And the doctor asked me what was the matter. They put me on those machines. And my blood pressure was 200 over 200 something. I knew I was threatening something, but thank God I didn't have a stroke.")); **AER 677-680** (ER record states BP is 204/98).

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main house and when containment personnel began to see movement in the addition on the east side of the house, deputies Schlegel and Demello began to try to force open the front security door. When it became apparent to sergeant Walker that it was going to be difficult, and timely, to breach the door, he ordered Dep. O'Sullivan to break the front window of the location, allowing the entry team to see into the location and protect the deputies as they tried to open the door." **AER 667-668** (Stella Report). Apparently, no supervisor cared about the inaccuracy of the After-Action Report.

*g. The Search.*

Defendants found neither Bowen, his pistol-grip sawed off shotgun, his clothing, nor anything else indicating that Bowen resided in the Millenders' home. The only indication that Bowen had any connection to the Millenders was the five-month old letter to Bowen from a social services agency.

Not finding Bowen changed nothing. Defendants continued as if he were there. Deputies searched for about four hours.

The Millenders had to wait outside for hours and sat inside for another 45 minutes. **AER 836-838** (WM 23:25-24:3, 32:21-23; **AER 782, 785-787** (AM 47:4-10, 54:10-18, 58:24-59:24, 58:10-23; **AER 814-815** (Brenda 58:23-59:5).

No one could use the bathroom. Mrs. Millender had to urinate in the street. **AER 783, 784** (AM 51:12-21, 52:13-16). Mrs. Millender couldn't use her walker or get a sweater. **AER 782** (AM 47:16-22). Brenda, fearful of the glass from the smashed window (because diabetics have problems healing) was not allowed shoes or slippers. **AER 812-813** (Brenda 47:9-48:19). William was handcuffed the entire time. **AER 834-835, 838** (WM 13:20-25, 14:15-22, 32:21-23).

Defendants dumped closets and drawers and went through the Millenders' papers and records.

Defendants seized Mrs. Millender's personal Mossberg shotgun, some .45 caliber ammunition, and

the June 16, 2003 letter from Social Services requesting Bowen to appear for a medical evaluation. **AER 673** (letter). **AER 675-676** (Receipt for Seized Property).

## ARGUMENT

### I. The Petition Does Not Meet the Requirements of Rule 10.

Petitioners do not assert that the Ninth Circuit's decision is in conflict with another United States court of appeals, or the decision of any state court, in any regard.

Rather, they assert that in the twenty-five years since the Court decided *Leon*, 468 U.S. 897 and *Malley*, 475 U.S. 335, there have been a "startling," "large and disturbing" number of cases that have provoked dissents regarding the application of *Leon* and *Malley*, Pet. 12, 30, 39, because the legal standard is "woefully open ended." Pet. 19.

Petitioners identify nineteen state and federal cases that have resulted in a dissenting opinion. Pet. 30-38. According to Westlaw (as of April 10, 2011), *Leon* has been cited 12,898 times and *Malley* 20,713. *Malley* is cited over 800 times a year, over 40 times a month.

In this context, eight dissenting opinions (including unpublished orders), from three federal courts of appeals (the 6th, 9th and 10th) and eleven from the courts of just six states (including intermediate

appellate courts), in 25 years, appears neither "large," nor "startling" nor "disturbing."[8]

Moreover, Petitioners identify no consistent thread in the nineteen cases. For the most part, they are quite different from one another. Many involve unique questions of law, *e.g.*, whether qualified immunity is appropriate when someone forgets to include the description of the items subject to seizure in the warrant, *Groh v. Ramirez*, 540 U.S. 551 (2004), or where the warrant is issued by a commissioner without jurisdiction, *Commonwealth v. Shelton*, 766 S.W.2d 628, 630-31 (Ky. 1989), or when information is communicated to the magistrate but not in the affidavit, *United States v. Luong*, 470 F.3d 898, 901 (9th Cir. 2006) (Callahan). Sometimes, *e.g.*, *Poolaw*, 565 F.3d, 721, they involve interesting and important issues, such as whether one's status as the natural parent of a suspect is sufficient to establish probable cause.

Petitioners do not contend that any of these nineteen cases are specifically similar, factually or legally, to *Millender*.

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[8] *Cf. Connick v. Thompson*, * U.S. * (2011) (four reversals of dissimilar *Brady* violation in the 10 previous years could not have put the district attorney's office on notice of the need for specific training).

## II. Petitioners' Contentions Were Not Properly Raised in the Courts Below.

Questions not properly raised below are not properly before the Court. *Delta Airlines v. August*, 450 U.S. 346, 362 (1981).

As the Millenders pointed out below, Appellees' Brief at 27-28, Petitioners' entire qualified immunity argument in the district court, aside from boilerplate legal argumentation, was an assertion that "any mistakes of fact or law made by Det. Messerschmidt and by Lawrence were reasonable, entitling defendants to qualified immunity." **AER 22** (Motion 19:1-2). Defendants did not explain what their "mistakes of fact or law" were, much less why they should be considered "reasonable."

Defendants' arguments are fact-based.

For example, with regard to Mrs. Millender's Mossberg shotgun, in the Ninth Circuit Defendants for the first time argued, as they do now, that it was reasonable to take the Mossberg because Defendants "would not know if the suspect would be coming back and the officers would not want the suspect to gain access to more weapons and hurt other people, including the victim in this case." Brief 47.

This is a factual question which should have been brought up in the district court, where it could have been fully explored and surely rejected. Defendants point to no evidence that they took Mrs. Millender's Mossberg because they in fact thought

Bowen would return, or that it would have been reasonable to think so. As set forth above, the existing evidence strongly indicates that no reasonable person would believe Bowen "would be coming back." There was nothing suggesting Bowen had recently been at the Millenders' home, nor that he was likely to do be there in the future. None of Bowen's possessions, like his clothes, were there. A single, five-month-old letter Bowen never picked up was the only trace of any past connection. The letter's very presence indicated Bowen had not been there for at least five months.

And why would Mrs. Millender allow Bowen entrance, after learning the authorities wanted him, and were willing to destroy her home and take her property at the least suggestion he might be there? Where is the evidence that Mrs. Millender was crazy, or complicit in Bowen's crime, or that Bowen could get into the Millenders' home?[9]

Perhaps even more significantly, Petitioners' new arguments shed new light on the critical importance of what Defendants *left out* of the affidavit, *i.e.*, any mention that *anybody* else, in particular the *Millenders*, lived at 2234 E. 120th Street, and that Kelly only surmised, for unknown reasons, that Bowen was "*hiding out*" there (if she was not "mistaken").

The affidavit falsely made it appear that 2234 E. 120th Street was Bowen's place of permanent abode ("residence," as commonly defined), where he lived,

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[9] And there is no evidence Bowen knew the existence of, or needed, Mrs. Millender's Mossberg (he had his own gun).

*alone*. Nor did the affidavit reveal that there was no reason to believe that the Millenders knew Bowen (if he were there at all) was sought by authorities, or why.[10]

That 2234 E. 120th Street was the Millenders' permanent place of abode (and that Bowen's connection was limited to being a long-ago foster child) meant that not everything in the Millenders' two houses, garage, storage shed, and cars belonged to Bowen, The family actually living there (for over 50 years) would obviously have their own lawful possessions, untainted by Bowen. No reasonable person could think otherwise. Knowing this would have made it unlikely that any responsible person would authorize police rummaging through and seizing the Millenders' possessions, including Mrs. Millender's Mossberg, with no consideration to the Millenders' rights.

Moreover, it is unlikely that anyone knowing that Bowen , at most, was "hiding out" at the Millenders' (without the Millenders' knowing he was "hiding out") would have approved seizing Mrs. Millender's Mossberg, based on the highly unlikely speculative possibility, unsupported by a scintilla of evidence, that Bowen "would be coming back," after his "hideout" was discovered. By definition, people "hide out" where they are not expected to be. For example, the "spider hole" was Sadam Hussein's "hide out" (not his "residence"), and it is unlikely Sadam would have

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[10] Petitioners' argument that "There is no accusation that [Defendants] deliberately omitted or manufactured any information in order to procure the warrant," Pet.26, is laughable.

"come back" after its location was discovered. That Bowen was long gone was obvious.

No reasonable person would have seized Mrs. Millender's Mossberg based on the nonsensical notion that Bowen would "return" and arm himself with it. Obviously, Defendants did not in fact think Bowen was going to "return." They put Bowen's last-known residence (1425 West 9th Street, where the crime occurred) under surveillance and contacted Kelly to inquire about "the possible whereabouts of Bowen." This unfortunately belated inquiry led immediately to Bowen's arrest. **AER 79:24-26.**

The Ninth Circuit properly rejected the similar arguments that Defendants should be immune for illegally seizing Mrs. Millender's property because they could have established probable cause to search for and seize any firearms-related items in the Millenders' possession, because Bowen was dangerous and had been convicted of a felony. **App.22-23.**

Like Defendants' other arguments, these were never made in the district court. The "felon in possession" claim was never briefed at all. The Ninth Circuit declined to consider it because "the deputies would need to present evidence on critical factual issues" including whether it would be immediately apparent that Mrs. Millender's Mossberg was contraband or evidence of a crime when Bowen did not have *any*, much less "sole dominion or control over the 120th St. address." **App.23-24, fn.5.** "Access to premises does not equate to possession," *United States v. Ruiz*, 462 F.3d 1082, 1089 (9th Cir. 2006), and here

there was no evidence that Bowen even had access to the premises, much less to Mrs. Millender's Mossberg.

With regard to the "gang-related" items, Petitioners' argument that when Messerschmidt "applied for the warrant, he did not know Bowen's assault on Kelly was not gang-related," Pet 25, was never raised below.

As the Ninth Circuit majority recognized, this argument "borders on the frivolous, given Messerschmidt's statement that he had no reason to hold such a belief, and the absence of any evidence that the crime at issue was gang-related." App.35.

Aside from Messerschmidt's testimony that he had no reason to believe the domestic violence between Bowen and Kelly was somehow "gang-related," there *is* no evidence. Certainly, there is no indication that Messerschmidt *ever* thought it was "gang-related," or even that, at the time he applied for the warrant, he didn't know it wasn't. AER 877 (Messerschmidt 119:9–120:10). Had the issue been raised below, any factual issues could have been addressed.

Had Defendants made the claim, it would most likely have been rejected. First, Messerschmidt's testimony, given while discussing the affidavit and his knowledge at the time, in the past tense, unmistakably appears to have reflected his knowledge at the time he completed the affidavit. AER 877 (Messerschmidt 119:9–120:10 ("Q: So you didn't have any reason to believe that the assault on Kelly was any sort of gang

crime, did you? A: No.") . Second, there is no suggestion that Messerschmidt learned something new about the incident *after* applying for the warrant which made it clear to him that the incident was not "gang-related." Defendants have never claimed he did, nor even hypothesized what such information could possibly be.

Second, and more basically, the question whether the *absence* of information may supply probable cause could have been addressed. Not knowing the incident was *not* "gang-related" is no more justification for assuming it was than "I didn't know he *wasn't* dangerous" is for shooting a fleeing suspect in the back. *Tennessee v. Garner* 471 U.S. 1, 21 (1985). This concept is elementary.

Petitioners' argument that it was reasonable to search for "gang-related" items because Bowen's gun could be "concealed in Mona Park Crip clothing," Pet.25, also should have raised below, and was not. What is "Mona Park Crip clothing?" Does it even exist?

Petitioners' argument that Defendants' failure to justify the warrant's breadth was due to Messerschmidt's inadvertent failure to include information, Pet.25, was also never raised below. Petitioners point to no evidence supporting that claim. When asked if he had inadvertently omitted anything from the affidavit, Messerschmidt testified he had not. AER 850-51 (Messerschmidt 12:10–13:12). Consequently, this case is unlike *Groh v. Ramirez*, 540 U.S. 551 or *United States v. Hove*, 848 F.2d 137 (9th Cir. 1988), where there were in fact mistakes.

Petitioners' argument that Defendants' failures should be excused because of "borderline exigent circumstances," and "an imminent danger to the public," Pet.26, was not raised below. These are primarily factual arguments. Had they been raised below, they likely would have been rejected. The crime, of which Defendants were immediately aware, occurred October 17, 2003. The search was three weeks later, November 6.

In the interim, Defendants had time, among many other things, to interview Kelly as well as a witness, at the station (on videotape), to obtain both drive-by and aerial photographs of the Millenders' home, to photograph Kelly's car, to stop and detain William Johnson, to search Brenda's car, and to investigate and personally discuss with the Millenders *the presence of loiterers gambling near the Millenders'* home. **AER 252:11-18.** Of these facts there is no dispute. Defendants offer no explanation how, under these circumstances, their failures may be excused because of any supposed "exigency."

## III. Petitioners' Contentions Should Be Rejected.

The clearly-established rules that "in passing on the validity of a warrant, the reviewing court may consider only information brought to the magistrate's attention," *Aguilar v. Texas*, 378 U.S. at 109 n. 1, and that "probable cause must exist to seize all the items of a particular type described in the warrant," *In re Grand Jury Subpoenas*, 926 F.2d at 857, should not be abandoned; certainly not on this record.

Petitioners' laundry list of "cures," Pet.13, for the "problems" of *Leon* and *Malley*, none of which have been adopted by any court, would not help matters.

Limiting challenges to instances in which affiants "intentionally and recklessly" [*sic*?] give magistrates false information would eliminate challenges even where the warrant was indisputably inadequate, and have the perverse effect of encouraging "bare-bones" warrants. The less said, the more difficult to challenge its truthfulness. Moreover, it would not eliminate the difficulty of determining whether the "false information" was sufficiently material to make a difference.

Petitioners do not explain what a magistrate "abandon[ing] his or her neutral judicial role or [being] incapable of fulfilling it" due to "particular circumstances" is supposed to mean. Would it include cases where the "magistrate" did not have the authority to issue a warrant, *e.g.*, *Shelton*, 766 S.W.2d 628, or those where someone mistakenly failed to tell the magistrate what the probable cause was, *e.g.*, *Hove*, 848 F.2d 137, *State v. Belmontes*, 615 N.W.2d 634 (S.D. 2000), or something else? What exactly is a "particular circumstance?"

Limiting challenges to "bare-bones" or "insubstantial" affidavits would cause more problems than it "solved." What is a "bare-bones" affidavit? Is it to be judged by length or does substance count? By any fair standard, the affidavit here could appropriately be called "bare-bones" and "insubstantial." Probable cause to arrest Bowen was easy and indisputable.

Messerschmidt's training and experience had virtually no bearing. The only real issue was whether Defendants should have been searching the Millenders' home at all — much less at night in a terrifying SWAT break-in. As discussed above, Defendants' affidavit contained not a syllable about *why* Kelly supposed that Bowen was "hiding out" at the Millenders' (unless she was "mistaken"). Her acknowledgment that she might be "mistaken" was an obvious tip off that it might be total, inaccurate, speculation, as it was. What information did she in fact have? Where did she get it? When? How stale was it? There was just as little about why Messerschmidt concluded that Bowen's supposed "hiding out" somehow made the Millenders' home into Bowen's "residence." As discussed above, people don't "hide out" where they are routinely expected to be. Messerschmidt's bogus, one sentence representation that police records had "confirmed" that Bowen "resided" in the Millenders' home was, as the Superior Court found, "insubstantial."

Having a "supervisor or prosecutor" review an affidavit should not eliminate liability. Since approval by a judge does not provide immunity, *Malley*, neither can approval by a supervisor or prosecutor. *See Coolidge v. New Hampshire*, 403 U.S. 443 (1971) (probable cause determination by state attorney general invalid). A prosecutor is by definition not neutral, but an adversary, engaged in the "often competitive enterprise of ferreting out crime." *Coolidge*, 403 U.S. at 449. Does the diligence or competence of the prosecutor make any difference? Especially because prosecutors generally enjoy immunity, only Dr. Pangloss would trust prosecutorial approval not to become a perfunctory rubber stamp.

Eliminating the clearly-established rule that the affidavit must establish probable cause would essentially eliminate the protections afforded by warrants. It would no longer matter whether searching officials established probable cause to search one's home before an impartial magistrate. After-the-fact explanations would be just as good. A bare-bones affidavit could later be "cured" by information officials later claimed to have had. The opportunities for seemingly endless litigation would increase. Moreover, as some knowledgeable jurists have observed:

> "[A]nd although the effective neutrality and independence of magistrates in ex parte proceedings for the issuance of search warrants may be doubted, there is a practical reason for requiring warrants where feasible: it forces the police to make a record before the search, rather than allowing them to conduct the search without prior investigation in the expectation that if the search is fruitful a rationalization for it will not be difficult to construct, working backwards."

*United States v. Sims*, 553 F.3d 580, 583 (7th Cir. 2009) (Posner) quoting *United States v. Mazzone*, 782 F.2d 757, 759 (7th Cir. 1986).

Defendants' suggestion that *Aguilar's* requirement should be abandoned when "officers inadvertently, though reasonably given their responsibilities and circumstances, omitted facts establishing probable cause," Pet.13,and that *this* was

such a case, because of "borderline exigent circumstances," Pet.26, is, as discussed above, ludicrous. Defendants have offered no excuse for their failures and there are none.

Had Defendants acted appropriately given the seriousness of Bowen's crimes, they would have spent a moment more with Kelly exploring what she knew about Bowen's whereabouts. A moment more was all it took to find and arrest Bowen without incident. When Defendants eventually got around to doing so, on November 19, 2003, Kelly told them that Bowen might be found at his mother-in-law's or a motel at "41st Street and Figueroa Avenue." AER 79. As explained above, about thirty minutes later, Defendants went to the motel, knocked on the door, were admitted by Bowen's wife, and found Bowen hiding under the bed. AER 682-84.

Petitioners' final proposal, that an affidavit's failures should be overlooked if the "warrant, even if overbroad, did not expand the scope of the search beyond areas properly searched if the warrant were narrowly tailored," Pet.13, is not thought out. Apparently, this "only-size-matters approach" would excuse any overly broad warrant if there were probable cause to search for one small item. Moreover, it does not at all address the problem in this and many other cases, the *seizure* of items for which there was no probable cause — here, for example, Mrs. Millender's Mossberg — which she, in addition, had a specific constitutional right to possess. *District of Columbia v. Heller*, 554 U.S. 570, 626-629 (2008). "[O]wning a gun is usually licit and blameless conduct. Roughly 50 percent of American homes contain at least one firearm

of some sort . . . ." *Staples v. United States*, 511 U.S. 600, 613-14 (1994). "Common sense tells us that millions of Americans possess these items [revolvers, pistols, rifles, and shotguns] with perfect innocence." *United States v. Anderson*, 885 F.2d 1248, 1254 (5th Cir. 1989).

Moreover, Petitioners do not explain how the warrant's authorization to search for "gang-related" items, including, for example, "photographs or photograph albums depicting persons, vehicles, weapons or locations, which may appear relevant to gang membership," **AER 118**, did *not* expand the scope of the search. A search for even a "small" shotgun would not have required Defendants to examine the Millenders' family photo albums.

## IV. If the Court Wishes to Take Up this Case it Should Direct its Attention to Issues of Much Greater Significance.

### *a. The standard for civil liability should be different than the standard for suppressing evidence in a criminal case.*

Petitioners' main theme is that the Court should make it more difficult for civil plaintiffs to recover for constitutional violations because that would also reduce the impact of the exclusionary rule. **Pet. i, 12, 16, 19, 31, 32, 34, 39, 40.** Consequently, according to Petitioners, civil plaintiffs should be permitted to recover only for the most "egregious" constitutional violations. **Pet.17, 19, 20, 38, 41, 42.**

The Millenders respectfully disagree. The Fourth Amendment provides that the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated . . . ." The Founding Fathers, obviously, did not intend Constitutional protections to prohibit only the most "egregious" violations. For a wrong, there should be a remedy.

*Leon* involved the suppression of evidence in a criminal case. The Court weighed the interests of the Fourth Amendment against the interests of the penal system and found that it was very important to allow a prosecutor to use evidence against a criminal suspect and that when the officer acted in good faith in procuring a warrant, that should not affect the prosecutor's ability to convict criminals. *Leon*, 468 U.S. at 922 ("We conclude that the marginal or nonexistent benefits produced by suppressing evidence obtained in objectively reasonable reliance on a subsequently invalidated search warrant cannot justify the substantial costs of exclusion.").

In contrast, civil cases have nothing to do with suppressing evidence or convicting criminals, and therefore *Leon*'s reasoning does not apply. To the contrary, "in the case of the § 1983 action, the likelihood is obviously greater than at the suppression hearing that the remedy is benefitting the victim of police misconduct one would think most deserving of a remedy — the person who in fact has done no wrong, and has been arrested for no reason, or a bad reason. *Malley* 475 U.S. at 344 (*citing Owen v. City of Independence*, 445 U.S. 622, 653 (1980)); *Hudson v. Michigan*, 547 U.S. 586, 597-99 (2006) (Benefits of civil

remedy for damages under 42 U.S.C. § 1983 for innocent victims of Fourth Amendment violations).

*Guzman v. City of Chicago*, 565 F.3d 393 (7th Cir. 2009), citing *Herring v. United States*, 555 U.S. 135, 129 S.Ct. 695, 700 (2009), and *Sims*, 553 F.3d 580, observed that it might be wise to "approach civil cases differently from criminal cases because to find a violation in a civil case raises 'no concern that the sanction for violating the Fourth Amendment would be disproportionate to the harm caused by the violation.'"

It makes *less* sense to cause the Millenders to suffer "because the constable has blundered," *People v. Defore*, 242 N.Y. 13, 21,150 N.E. 585, 587 (1926) (Cardozo, J.,), *Wolf v. Colorado*, 338 U.S. 25, 31(1949), than to allow the criminal "to go free." *Id.*

*b. **Public entities should be responsible, under the doctrine of respondeat superior, for their agents.***

As explained by Justice Stevens, when "a police officer is engaged in the performance of his official duties, [and] violates the Federal Constitution while he is performing that mission, . . . federal law provides the citizen with a remedy against his employer as well as a remedy against him as an individual." *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 834 (1985) (Stevens, J., dissenting).

The Court should reconsider Justice Stevens views.

*Respondeat superior* liability would substantially increase the probability that victims of Constitutional violations would obtain redress. As it is now, many clear violations are not redressed. The individual who commits the act claims and often is awarded immunity; and entities will withstand efforts to prove the violation was caused by a custom, practice or policy of the entity.

Public entities, sadly, have no more obligation to compensate victims of clear constitutional wrongs perpetrated by their agents than do private parties to compensate the victims of their transgressions. *See Berger v. United States*, 295 U.S. 78, 88 (1935) (public prosecutor's obligation "that justice shall be done").

As a result, public entities vigorously avoid compensating victims by claiming that the employee is entitled to immunity, and the plaintiff cannot establish liability under *Monell v. New York Dept. of Social Servs.*, 436 U.S. 658 (1978).

As Petitioners capably demonstrate, qualified immunity is always subject to argument. There is a qualified immunity appeal in virtually every case. Such appeals automatically buy defendants years, while consuming enormous resources.

*Monell* liability is no less litigable. *E.g., Connick v. Thompson*, ___ U.S. ___ (2011) (four reversals for dissimilar *Brady* violations in 10 years did not put the district attorney's office on notice of the need for specific training). "*Monell*" discovery and the attendant inevitable disputes, not to mention summary

judgment motions, trials and appeals, enormously complicate what would otherwise be the simplest case.

The absence of *respondeat superior* and the complications of *Monell* mean that it is easy, albeit costly, to avoid redressing constitutional violations. If the plaintiff manages to withstand the entity's summary judgment motions, the defense trial strategy is to seek "bifurcation" (trial of individual liability in a "first phase," before entity liability). The first phase goal is convince jurors the individuals should be exonerated because they were only doing what their employer trained and expected them to do; or at least condoned (which is generally obvious because they are still employed and there is no evidence of any discipline). This works because "jurors' general sense of fairness mitigates against blaming an officer for causing a constitutional injury when he merely carried out department policy as an obedient employee." Douglas L. Colbert, *Bifurcation of Civil Rights Defendants: Undermining Monell in Police Brutality Cases*, 44 HAST. L.J. 499, 548 (1993). If no individual liability is found, the entities then argue there can be no liability at all, for want of a constitutional violation. *City of Los Angeles v. Heller*, 475 U.S. 796 (1986).

This exercise, which exploits jurors' natural sympathy for lower-level workers, especially law enforcement officers performing necessary and dangerous jobs, and jurors' uncertainty about whether individual defendants will be required to pay an award, is largely a charade, unbecoming the integrity of the judicial process. Generally, as in California, entities are as a matter of law both vicariously liable for employees' mistakes and obligated to indemnify.

*Robinson v. Solano County*, 278 F.3d 1007, 1013, 1016 (9th Cir. 2002) (*en banc*) ("California . . . has rejected the Monell rule and imposes liability on counties under the doctrine of respondeat superior for acts of county employees"); Cal. Gov't Code §§ 815.2(a), 825(a).

Consequently, the absence of *respondeat superior* and the complications of *Monell* mean that dispute-resolution costs frequently outstrip everything else. This case could be "**Exhibit A.**" Without disrespect to Defendants' counsel, it appears the primary beneficiaries are the lawyers the public pays with hard tax dollars, since this expensive process does not save the public. Also, prevailing plaintiffs become entitled to compensation for reasonable attorney fees, in amounts significantly increased by the absence of *respondeat superior*. *Respondeat superior* liability would rationalize the process, save resources, and provide redress where it is merited.

## CONCLUSION

For the foregoing reasons, respondents urge the Court to deny the petition for *certiorari*.

Respectfully Submitted,

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# REPLY BRIEF

No. 10-704

# In The Supreme Court of the United States

CURT MESSERSCHMIDT and
ROBERT J. LAWRENCE,

*Petitioners,*

vs.

AUGUSTA MILLENDER, BRENDA MILLENDER,
and WILLIAM JOHNSON,

*Respondents.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## REPLY TO BRIEF IN OPPOSITION


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## INTRODUCTION

The Brief in Opposition ("BOP") underscores why review is necessary in this case. It is emblematic of the sort of obfuscation, nitpicking and second-guessing that plagues civil and criminal proceedings challenging a magistrate's issuance of a warrant after the fact.

Respondents devote much of their argument, and indeed 14 pages of a 19-page Statement of Facts, to attacking the propriety of issuing a third-party warrant to search their premises at all, even though respondents lost these issues in the district court and did not resurrect them on appeal—a fact noted by the dissent. (App.60-61 & n.15.)

In fact, respondents utterly ignore the two dissents, and indeed the bulk of the *en banc* majority opinion, all of which discuss petitioners' contentions at length and give the lie to respondents' assertion that petitioners' substantive challenges have somehow been "waived."

More astoundingly, although the fundamental dispute between the majority and the two dissents was whether under *Malley v. Briggs*, 475 U.S. 335, 341, 344-45 (1986) and *United States v. Leon*, 468 U.S. 897, 923 (1984) the warrant application was "so lacking in indicia of probable cause" as to indicate petitioners were "plainly incompetent" or "knowingly violat[ing] the law," respondents do not even mention the pertinent standard.

In *Malley* and *Leon*, this Court made it clear that an officer's seeking a warrant bespeaks good faith and that civil liability should be imposed or evidence excluded in a criminal proceeding based upon an erroneous warrant only where it could be said that the officer's actions were plainly incompetent or knowingly in violation of the law. *Malley*, 475 U.S. at 345. Yet, this case amply illustrates the wholesale departure from that stringent standard. Can it be said that the two dissenting Ninth Circuit judges who found that there was probable cause to search for any weapon are "plainly incompetent" or condone the knowing violation of the law? Can an officer rationally be deemed to be "plainly incompetent" or "knowingly violat[ing] the law" in seeking a warrant for indicia of gang membership when, as the three dissenting judges note, there are plenty of logical reasons why an officer might reasonably, but erroneously, conclude that searching for such material was proper and the majority itself had to engage in close and extensive analysis in order to conclude otherwise?

This goes well beyond a conflict between circuits. It is a dispute played out in federal and state civil and criminal proceedings across the country, where, as noted in the petition, appellate justices disagree not simply on whether an officer has acted in good faith, but on the underlying issue of probable cause in the first instance. If, as the court held in *Malley* and *Leon*, the standard for civil liability or suppression of evidence following a magistrate's determination of

probable cause is a high one, limited to those circumstances where the officer is "plainly incompetent" or "knowingly violate[s] the law," then there should not be such sharp disagreement on fundamental issues. Such disagreement, and indeed the wholesale litigation of a magistrate's determination of probable cause by way of both criminal and civil proceedings, is made possible only because of the amorphous nature of the "so lacking in indicia of probable cause" standard.

It is essential that this Court grant review to provide clear standards for imposition of civil liability or exclusion of evidence in a criminal proceeding arising from a magistrate's erroneous issuance of a warrant, in order to vastly reduce the ubiquitous challenges to such determinations in civil and criminal proceedings. The Court could make it clear that where an officer seeks a warrant, good faith is presumed and the evidence admissible in a criminal proceeding, and the officer is shielded from civil liability, except where the party challenging the warrant submits evidence to rebut that presumption. Such evidence might include deliberately false or misleading statements, deliberate omission of exculpatory facts from a warrant application, or evidence that the officer knew that the magistrate was impaired and unable to perform the functions of his or her office. Alternatively, at the very least, good faith should be presumed where an officer submits an application for review by superiors or prosecutors before submitting it to a magistrate, or possessed facts establishing probable cause even though the

facts might have been omitted from the final application, or submits an extensive as opposed to "bare-bones" application.

Application of such standards will assure that warrants are challenged only in those circumstances where officers are indeed "plainly incompetent" or "knowingly violate the law"—precisely the sort of core police misconduct that imposition of civil liability under section 1983 and exclusion of evidence under the Fourth Amendment was designed to deter.

Finally, respondents offer no proper additional issues for review. They assert that the standard for civil liability should be lower than the standard for excluding evidence arising from a magistrate's erroneous issuance of a warrant. (BOP32-34.) Yet, this Court has repeatedly recognized that qualified immunity is necessary to assure that officers will vigorously perform their duties. Respondents also ask the Court to reconsider its decision in *Monell v. New York Dept. of Soc. Servs.*, 436 U.S. 658 (1978). However, the County of Los Angeles is not a party to this proceeding, the underlying appeal was from the denial of qualified immunity to petitioners, and no *Monell* claim was litigated in the Ninth Circuit, nor could it be. Further, just this term, the Court unanimously reaffirmed the *Monell* standard. *Los Angeles County v. Humphries*, 131 S.Ct. 447, 453-54 (2010); *Connick v. Thompson*, 131 S.Ct. 1350, 1365 n.12 (2011).

## ARGUMENT

### I. THE ABSENCE OF CLEAR STANDARDS FOR IMPOSING CIVIL LIABILITY OR EXCLUDING EVIDENCE IN CRIMINAL PROCEEDINGS BASED ON A MAGISTRATE'S ERRONEOUS DETERMINATION OF PROBABLE CAUSE REQUIRES REVIEW BY THIS COURT.

The Ninth Circuit's decision in this case illustrates the continuing mischief wrought by the amorphous "so lacking in indicia of probable cause" standard. If *Malley* means what it says and in fact civil liability should be imposed or evidence excluded in a criminal proceeding only where the officers' actions in securing a warrant can be described as "plainly incompetent" or "knowingly violat[ing] the law," then the clear implication is that two judges in the Ninth Circuit similarly are "plainly incompetent" or knowingly support violation of the law. That one intuitively balks at such a characterization underscores the *en banc* majority's departure from *Malley*'s clear standard, a departure made possible only because of the standardless nature of the "so lacking in indicia of probable cause" inquiry. There is a conflict not simply among circuits as to what the phrase means, but as between individual judges.

This disagreement is not confined to a single circuit, nor even to federal courts. As noted in the petition, there are numerous state and federal appellate decisions in such cases where courts divide not simply on the question of whether qualified immunity

exists, but on the more fundamental issue of whether there was probable cause in the first instance. Can it be said in all of those cases that dissenting justices are "plainly incompetent" or knowingly condone the violation of law? This is precisely the "common thread" running through those cases that respondents simply ignore—the wholesale *ad hoc* application of the "so lacking in indicia of probable cause" standard so as to make every inquiry into a warrant's validity not so much whether the officer was "plainly incompetent" or "knowingly violat[ing] the law," but whether a majority of judges believe there was probable cause to issue the warrant.

As the dissent notes, the price paid for such amorphous standards is the expenditure of scarce judicial resources in litigating such claims in civil and criminal proceedings, as any aggrieved party has an incentive to seize upon any error in the warrant application or transgression by the officer, no matter how minor, to seek redress for an imagined injury, or exclusion of relevant evidence in a criminal proceeding. Indeed, respondents inadvertently underscore the ubiquity of such challenges when they cite the numerous invocations of *Malley*, *Leon*, and their progeny in courts across the nation. (BOP19.)

As this Court recognized in *Malley* and *Leon*, the standard governing civil liability and exclusion of evidence as the result of a magistrate's erroneous determination of probable cause is a significant issue that affects the day-to-day operation of the criminal

justice system. The lack of clear guidance has resulted in the routine challenge of warrants in civil and criminal proceedings. It is essential this Court provide clear guidelines to curtail this endless loop of litigation.

## II. PETITIONERS' QUALIFIED IMMUNITY CLAIMS WERE PROPERLY RAISED IN, AND ADDRESSED BY, THE NINTH CIRCUIT.

Respondents contend that petitioners' arguments concerning probable cause and application of qualified immunity have somehow been waived. (BOP30-37.) Review of the *en banc* majority and dissenting opinions belies this characterization.

Respondents essentially contend that the arguments petitioners presented in the Ninth Circuit were more articulate and expansive than those presented in the district court. (BOP21-27.) As illustrated by both the *en banc* majority decision and the dissents, however, petitioners raised, and the court squarely addressed, the various contentions concerning the existence of probable cause to search for weapons or indicia of gang membership, as well as the applicable authority making clear that qualified immunity should apply to these claims. (App.11-76.) It is simply absurd to suggest, as respondents do, that the issues were not properly preserved for review by this Court—the issues form the entire substance of the *en banc* and dissenting opinions in the Ninth Circuit.

Nor, contrary to respondents' contention, are there any arguments with respect to qualified immunity that required presentation of additional evidence in the district court. (BOP21-27.) As review of the *en banc* majority and two dissenting opinions reveals, with one minor exception relegated to a footnote, the differences between the majority and dissenters were not that a triable issue of fact existed. Rather, they differed on application of the law to the undisputed facts—the warrant affidavit, the warrant itself, and the information possessed by the officers. While the majority suggested that invocation of the plain view doctrine to justify seizure of the shotgun from the Millender residence would have required additional factual material in the district court (App.23-24 & n.5), the dissent believed no additional factual inquiry was necessary as the plain view doctrine was not necessary to providing probable cause to seize the shotgun, given the officers' knowledge that Bowen had assaulted his girlfriend with a shotgun and was an ex-felon (App.41-45 & nn.4-6).

The issues raised in the petition were properly presented to, but erroneously resolved by, the Ninth Circuit.

## III. THE COURT SHOULD GRANT REVIEW TO PROVIDE CLEAR STANDARDS LIMITING CIVIL LIABILITY OR THE EXCLUSION OF EVIDENCE BASED UPON A MAGISTRATE'S ERRONEOUS DETERMINATION OF PROBABLE CAUSE.

This Court has stated that "a magistrate's determination of probable cause should be paid great deference by reviewing courts." *Illinois v. Gates*, 462 U.S. 213, 236 (1983). Yet, as this case amply illustrates, in fact magistrates' determinations of probable cause are challenged routinely, with parties seizing on every factual omission or defect in form to second-guess determinations of probable cause.

As this Court recognized in *Malley* and *Leon*, when officers seek a warrant, their actions bespeak good faith in that they are willing to submit the evidence they possess to review by a neutral magistrate. To impose liability or exclude evidence in a criminal case based upon after-the-fact second-guessing of the warrant determination discourages officers from seeking warrants, and encourages them in close cases to rely instead upon exigent circumstances or some other basis to justify a warrantless search or arrest. Thus, exclusion of evidence or imposition of civil liability should be limited to those circumstances where an officer clearly engages in misconduct, i.e., where his or her conduct is "plainly

incompetent" or "knowingly violate[s] the law." *Malley*, 475 U.S. at 341.

To this end, petitioners submit the Court should make it clear that when an officer seeks a warrant, it is presumed that the officer acted in good faith for purposes of qualified immunity in a civil proceeding or exclusion of evidence in a criminal trial. That presumption may be rebutted only by objective evidence showing that the warrant was procured by misconduct. Such instances would include the officer's knowing presentation of false evidence in support of the application, or his or her deliberate omission of material exculpatory facts from the warrant material.[1] It would also include evidence that the officer knew that the magistrate in fact was not neutral or was incapable of providing independent review of the warrant application.

These are admittedly extremely narrow circumstances. Yet, as noted, the Court has made it clear that civil liability and exclusion of evidence should be limited to the rarest of cases, i.e., the most egregious cases of police misconduct, and not invoked simply upon a mere negligent act or omission by an

---

[1] Contrary to respondents' assertion (BOP22-23 & n.10), there was no claim of concealment or omission of facts before the Ninth Circuit. As the dissent notes, respondents lost that claim in the district court, it was not renewed in the appellate court, and the majority opinion is not premised on any such claim. (App.63.)

officer. Application of such stringent guidelines would sharply limit after-the-fact challenges to warrants and terminate the endless litigation that accompanies such questions in the context of suppression hearings or civil suits.

At the very least, even if the Court does not impose such stringent standards, it should require courts to take into account specific facts in determining whether an officer's actions were "plainly incompetent" or "knowingly violate[d] the law." These would include the question of whether there was probable cause for the search, even if specific facts were omitted from the affidavit, whether the officers had the warrant application reviewed by a superior or by a prosecutor, and whether the officer presented substantial information in the warrant affidavit and not simply a "bare-bones" recitation of facts.

Respondents take petitioners to task for suggesting such criteria, employing the very nitpicking that has reduced suppression hearings to elaborate games of "gotcha." They feign ignorance as to what it would mean for a judicial officer to be so impaired as to be unable to perform his or her duties as a neutral magistrate. Obviously, when an officer knows a magistrate has already agreed to issue a warrant regardless of its contents, the officer cannot be said to know that the magistrate was acting in neutral fashion. Similarly, a magistrate who is physically or mentally

impaired so as to be unable to actually review the substance of an affidavit could not properly be relied upon by an officer seeking a neutral determination of probable cause.

Respondents also assert that no interest is served in having a warrant application reviewed by a police supervisor or a prosecutor, yet neither the police nor the prosecutor has an incentive to submit a defective warrant application knowing that a reasonable magistrate would likely deny it. And, as the dissent notes, even the Ninth Circuit has recognized that review by a prosecutor bolsters an officer's good faith in seeking a warrant. (App.55, 58-59, 64-65 [discussing *Ortiz v. Van Auhen*, 887 F.2d 1366 (9th Cir. 1989) and *KRL v. Estate of Moore*, 512 F.3d 1184 (9th Cir. 2008)].)

Respondents' suggestion that application of such standards would encourage officers to submit "bare-bones" affidavits misconstrues petitioners' argument and indeed is absurd. A warrant application that contains no substantive information at all is flatly incompetent. The notion that officers would have an incentive to submit bare-bones applications because the less said, the less there would be to challenge, is nonsensical. The point is that in routine circumstances, magistrates would reject such applications; hence, no officer, let alone an entire police agency

would have an incentive to submit such applications only to have them routinely rejected by a magistrate.

In *Malley* and *Leon*, this Court recognized that while magistrates may err in determining probable cause, the circumstances in which police officers should be held liable for such errors are rare indeed. Yet, because of the open-ended and amorphous "so lacking in indicia of probable cause" standard, litigation of such claims is the rule and not the exception. It is essential that this Court grant review to provide clear standards for imposition of civil liability and exclusion of evidence in criminal proceedings arising from a magistrate's erroneous determination of probable cause.

## IV. RESPONDENTS' ADDITIONAL ISSUES DO NOT MERIT REVIEW.

Respondents offer no proper additional issues for review. In a backhanded attempt to eliminate qualified immunity, they assert that the Court should consider whether the standard for civil liability should be lower than the standard for excluding evidence arising from a magistrate's erroneous issuance of a warrant. (BOP32-34.) Yet, as this Court noted in *Scheuer v. Rhodes*, 416 U.S. 232, 240 (1974), *overruled on other grounds by Davis v. Scherer*, 468 U.S. 183 (1984), qualified immunity is necessary to insulate police officers from the threat of personal

liability so that they can "execute [their] office with the decisiveness and the judgment required by the public good." Imposing blanket liability on police officers for reasonable mistakes would, as the Court has repeatedly recognized, result in officers electing not to vigorously enforce the law. *Anderson v. Creighton*, 483 U.S. 635, 638 (1987); *Elder v. Holloway*, 510 U.S. 510, 514 (1994).

Respondents also contend that this Court should reconsider its decision in *Monell v. New York Dept. of Soc. Servs.*, 436 U.S. 658 (1978), and impose *respondeat superior* liability on municipalities. However, the County of Los Angeles is not a party to this proceeding, the underlying appeal was limited to the denial of qualified immunity to petitioners, and no *Monell* claim was litigated in the Ninth Circuit. Further, just this term, the Court unanimously reaffirmed the *Monell* standard. *Los Angeles County v. Humphries*, 131 S.Ct. 447, 453-54 (2010); *Connick v. Thompson*, 131 S.Ct. 1350, 1365 n.12 (2011).

## CONCLUSION

Petitioners urge that the petition for certiorari be granted.

Respectfully submitted,

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# JOINT APPENDIX

No. 10-704

# In The Supreme Court of the United States

CURT MESSERSCHMIDT and ROBERT J. LAWRENCE,

*Petitioners,*

vs.

AUGUSTA MILLENDER, BRENDA MILLENDER, WILLIAM JOHNSON,

*Respondents.*

**On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## JOINT APPENDIX
## VOLUME I, Pages 1-98


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**Petition For Writ Of Certiorari Filed November 22, 2010**
**Certiorari Granted June 27, 2011**

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**UNITED STATES DISTRICT COURT,**
**CENTRAL DISTRICT OF CALIFORNIA**
**(Western Division – Los Angeles)**
**CIVIL DOCKET FOR CASE**
**#: 2:05-cv-02298-DDP-RZ**

Augusta Millender et al v. County of Los Angeles et al

| Date Filed | # | Docket Text |
|---|---|---|
| 03/28/2005 | 1 | COMPLAINT against Defendants Leroy Baca, S Walker, R Rector, D Nichiporuk, M Schlegel, D Stella, J Dernello, D OSullivan, J Ritenour, M Wilber, T Harris, I Stade, W Murray, L Foisner, J Bones, P Geisler, M Desmarteau, C Parge, P Hayes, R Conti, Lawrence, Cale, Bercini, Valento, C Messerschmidt, Pickett, Ortega, Faulkner, Does 1 through 10, County of Los Angeles, Los Angeles County Sheriffs Department. (Filing fee $250 paid), jury demand, filed by plaintiffs Augusta Millender, Brenda Millender, William Johnson.(jp, ) (Entered: 04/05/2005) |
| 06/15/2005 | 26 | ANSWER to Complaint – (Discovery), 1 with JURY DEMAND filed by Defendants Leroy Baca, S Walker, R Rector, D Nichiporuk, M Schlegel, D Stella, J Dernello [sic], D OSullivan, J Ritenour, M Wilber, T Harris, I Stade, W Murray, L Foisner, J Bones, P Geisler, M Desmarteau, C Parge, P Hayes, R Conti, Lawrence, Cale, Bercini, Valento, C Messerschmidt, |

Pickett, Ortega, Faulkner, William Johnson, County of Los Angeles, Los Angeles County Sheriffs Department.(pbap, ) (Entered: 06/27/2005)

09/18/2006 50 NOTICE OF MOTION AND MOTION for Summary Adjudication; Memorandum of Points and Authorities filed by Plaintiffs Augusta Millender, Brenda Millender, William Johnson. Motion set for hearing on 10/16/2006 at 10:00 AM before Judge Dean D. Pregerson. Lodged proposed order and statement uncontroverted facts. (pbap, ) (Entered: 09/20/2006)

09/18/2006 51 DECLARATION of Robert Mann in Support of Plaintiffs' MOTION for Summary Adjudication 50; Exhibits filed by Plaintiffs Augusta Millender, Brenda Millender, William Johnson. (pbap, ) (Entered: 09/20/2006)

09/18/2006 52 (MOTION NO. 1 – by individual Defendants) NOTICE OF MOTION AND MOTION for Summary Judgment and MOTION for Summary Adjudication; Memorandum of Points and Authorities; Declarations of Curt Alan Messerschmidt, Scott William Walker, Eugene P. Ramirez, Sandra Hutchens filed by defendant Leroy Baca, S Walker, R Rector, D Nichiporuk, M Schlegel, D Stella, J Dernello [sic], D OSullivan, J Ritenour, I Stade, C Messerschmidt, County of Los Angeles, Los Angeles

County Sheriffs Department. Motion set for hearing on 10/23/2006 at 10:00 AM before Judge Dean D. Pregerson. Lodged proposed order. (pbap, ) Modified on 9/22/2006 (pbap, ). (Entered: 09/22/2006)

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10/02/2006 62 OPPOSITION to plaintiffs' statement of uncontroverted material facts and conclusions of law re MOTION for Summary Adjudication 50 filed by defendants' Leroy Baca, R Rector, D Stella, J Ritenour, I Stade, County of Los Angeles, Los Angeles County Sheriffs Department. (bp, ) (Entered: 10/04/2006)

10/02/2006 63 DECLARATION of Eugene P. Ramirez re corrections to plaintiffs' exhibit L-Transcript of 11-6-03

entry into the Millenders' House re MOTION for Summary Adjudication 50 filed by defendants' Leroy Baca, S Walker, D Stella, I Stade, County of Los Angeles, Los Angeles County Sheriffs Department. (bp, ) (Entered: 10/04/2006)

10/02/2006 64 EVIDENTIARY OBJECTIONS TO PLAINTIFFS' EXHIBITS submitted in support of MOTION for Summary Adjudication 50 filed by defendants' Leroy Baca, S Walker, D Stella, I Stade, County of Los Angeles, Los Angeles County Sheriffs Department. (bp, ) (Entered: 10/04/2006)

10/02/2006 65 OPPOSITION to MOTION for Summary Adjudication 50 filed by defendants' Leroy Baca, R Rector, D Nichiporuk, M Schlegel, J Ritenour, I Stade, C Messerschmidt, County of Los Angeles, Los Angeles County Sheriffs Department. (bp, ) (Entered: 10/04/2006)

10/02/2006 66 OPPOSITION to MOTION for Summary Judgment MOTION for Summary Adjudication MOTION for Summary Adjudication MOTION for Summary Adjudication [sic] 52 filed by plaintiffs' Augusta Millender, Brenda Millender, William Johnson. (bp, ) (Entered: 10/04/2006)

10/02/2006 67 DECLARATION of Donald W. Cook in support of plaintiff's opposition to

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10/02/2006 68 STATEMENT of GENUINE ISSUES IN RESPONSE TO THE INDIVIDUAL DEFENDANTS' STATEMENT OF ALLEGED UNCONTROVERTED FACTS MOTION for Summary Judgment MOTION for Summary Adjudication MOTION for Summary Adjudication MOTION for Summary Adjudication [sic] 52 filed by plaintiffs' Augusta Millender, Brenda Millender, William Johnson. (bp, ) (Entered: 10/04/2006)

10/02/2006 69 OBJECTION TO DECLARATIONS OF DEFENDANT CURT MESSERSCHMIDT, DEFENDANT SCOTT WALKER AND SANDRA HUTCHENS re MOTION for Summary Judgment MOTION for Summary Adjudication MOTION for Summary Adjudication MOTION for Summary Adjudication [sic] 52 filed by plaintiffs' Augusta Millender, Brenda Millender, William Johnson. (bp, ) (Entered: 10/04/2006)

10/02/2006 70 STATEMENT of STATEMENT OF GENUINE ISSUES IN RESPONSE TO COUNTY DEFENDANTS'

| | | |
|---|---|---|
| | | STATEMENT OF ALLEGED UNCONTROVERTED FACTS re MOTION for Summary Judgment MOTION for Summary Adjudication MOTION for Summary Adjudication MOTION for Summary Adjudication [sic] 52 filed by plaintiffs' Augusta Millender, Brenda Millender, William Johnson. (bp, ) (Entered: 10/04/2006) |
| 10/03/2006 | 72 | SUPPLEMENTAL DECLARATION of Samantha Koerner in Support of Plaintiffs' Oppositions to Defendants' MOTION for Summary Adjudication 53, MOTION for Summary Adjudication 52 ; Exhibit filed by plaintiffs Augusta Millender, Brenda Millender, William Johnson. (pbap, ) (Entered: 10/11/2006) |
| 10/10/2006 | 74 | REPLY in Support of MOTION for Summary Judgment and or Summary Adjudication of Issues 52 filed by defendants S Walker, R Rector, D Nichiporuk, M Schlegel, D Stella, Jack Demello (erroneously sued as J Dernello), D OSullivan, J Ritenour, I Stade, Lawrence, C Messerschmidt. (pbap, ) (Entered: 10/19/2006) |
| 10/10/2006 | 76 | RESPONSE to Plaintiffs' OBJECTIONS TO DECLARATIONS OF DEFENDANT CURT MESSERSCHMIDT, DEFENDANT SCOTT WALKER AND SANDRA HUTCHENS 69 ; Declaration of Eugene P. Ramirez filed by Defendants |

Leroy Baca, S Walker, R Rector, D Nichiporuk, M Schlegel, D Stella, J Dernello [sic], J Ritenour, I Stade, Lawrence, County of Los Angeles, Los Angeles County Sheriffs Department.tto [sic] (pbap, ) (Entered: 10/20/2006)

10/10/2006 79 Individual Defendants' REPLY in Support of STATEMENT of Material Uncontroverted Facts and Contentions of Law 78 filed by Defendants S Walker, R Rector, D Nichiporuk, M Schlegel, D Stella, J Dernello [sic], D OSullivan, J Ritenour, I Stade, Lawrence, C Messerschmidt.(pbap, ) (Entered: 10/20/2006)

10/16/2006 81 REPLY to Defendants' Opposition to MOTION for Summary Adjudication 50 filed by Plaintiffs Augusta Millender, Brenda Millender, William Johnson. (pbap, ) (Entered: 10/24/2006)

10/16/2006 82 DECLARATION of Samatha Koerner in Supportof [sic] Plaintiff 's [sic] Reply to Defendant's Opposition to MOTION for Summary Adjudication 50 filed by Plaintiffs Augusta Millender, Brenda Millender, William Johnson. (pbap, ) (Entered: 10/24/2006)

10/16/2006 83 RESPONSE to Defendants' Objections to Transcripts of Tape Recordings filed by Plaintiffs Augusta Millender, Brenda Millender, William Johnson (pbap, ) (Entered: 10/24/2006)

| | | |
|---|---|---|
| 02/28/2007 | 102 | MINUTES OF Motion Hearing held before Judge Dean D. Pregerson : Court hears oral argument and takes the matters under submission. Court Reporter: Maria Bustillos. (yl, ) (Entered: 03/15/2007) |
| 03/15/2007 | 103 | ORDER by Judge Dean D. Pregerson: GRANTING IN PART AND DENYING IN PART PLAINTIFF'S MOTION for Summary Adjudication 50 ; GRANTING IN PART AND DENYING IN PART INDIVIDUAL DEFENDANTS' MOTION for Summary Judgment, or MOTION for Summary Adjudication 52. GRANTING IN PART AND DENYING IN MUNICIPAL DEFENDANTS' MOTION for Summary Judgment and or MOTION for Summary Adjudication 53. (pbap, ) (Entered: 03/19/2007) |
| 04/02/2007 | 109 | APPLICATION for Certification of Order For Interlocutory Appeal filed by plaintiffs Augusta Millender, Brenda Millender, William Johnson. (pj, ) (Entered: 04/20/2007) |
| 04/05/2007 | 110 | OPPOSITION to Plaintiffs Application for Certification of Order For Interlocutory Appeal 109 filed by Defendants S Walker, R Rector, D Nichiporuk, M Schlegel, D Stella, J Dernello [sic], D OSullivan, J Ritenour, I Stade, Lawrence, C Messerschmidt, County of Los Angeles, Los Angeles |

County Sheriffs Department. (ir, ) (Entered: 04/24/2007)

04/09/2007 111 REPLY to Defendants Opposition to Application for Certification of Order For Interlocutory Appeal 109 filed by Plaintiffs Augusta Millender, Brenda Millender, William Johnson. (ir, ) (Entered: 04/26/2007)

04/10/2007 107 NOTICE OF APPEAL to 9th CCA filed by defendants: C Messerschmidt, County of Los Angeles. Appeal of Order 103 Filed On: 3/19/07; Entered On: 3/19/07; Filing fee $455 paid receipt number 94956. cc: Eugene P Ramirez; Robert Mann (dmap. ) Modified on 4/11/2007 (dmap). (Entered: 04/11/2007)

05/25/2007 114 ORDER by Judge Dean D. Pregerson DENYING PLAINTIFFS' APPLICATION for Order for Certification of Order For Interlocutory Appeal 109 (pbap, ) (Entered: 05/29/2007)

**United States Court of Appeals**
**for the Ninth Circuit**

**Court of Appeals Docket #:** 07-55518

Millander, et al v. County of L.A. et al

| | | |
|---|---|---|
| 11/07/2007 | 14 | Filed original & 15 copies Aplts' opening brief (Informal: n) 49 pages & 5 Excs in 7 Vols.; served on 11/6/07 [07-55518] (GV) |
| 11/07/2007 | 15 | Received Aplts' Excerpts of Record Vol. 8 in support of mtn to file Vol. 8 of Excerpts of Record containing 10/22/05 videotaped interview by Def. Messerschmidt of victim Shelley Kelly; served on 11/6/07 (SHELF) (GV) |
| 01/23/2008 | 19 | Filed original and 15 copies appellees Augusta Millender, Brenda Millender, William Johnson's 30 pages brief; served on 1/22/08 [07-55518] (RT) |
| 02/22/2008 | 22 | Filed original and 15 copies appellants' reply brief, (Informal: No ) 21 pages; served on 2/21/08 [07-55518] (RT) |
| 10/21/2008 | 28 | ARGUED AND SUBMITTED TO FERDINAND F. FERNANDEZ, CONSUELO M. CALLAHAN and SANDRA S. IKUTA. (LN) |
| 05/06/2009 | 30 | FILED OPINION (FERDINAND F. FERNANDEZ, CONSUELO M. CALLAHAN and SANDRA S. IKUTA) VACATED; REMANDED. Judge: FFF Concurring, Judge: |

CMC Authoring, Judge: SSI Dissenting. **FILED AND ENTERED JUDGMENT.** (RP)

05/27/2009 33 **Filed (ECF) Appellees William Johnson, Augusta Millender and Brenda Millender petition for panel rehearing and petition for rehearing en banc (from 05/06/2009 opinion). Date of service: 05/27/2009. [6934966] (RM)**

05/29/2009 34 **Filed (ECF) Supplemental authority in support of petition for panel rehearing and rehearing en banc. Submitted by Appellees William Johnson, Augusta Millender and Brenda Millender. Date of service: 05/29/2009. [6938847] [Court corrected docket text to reflect filing – 6/2/09 by SS] (RM)**

06/16/2009 35 **Filed order (FERDINAND F. FERNANDEZ, CONSUELO M. CALLAHAN and SANDRA S. IKUTA): Appellants are hereby directed to file a response to Appellees' Petitions for Rehearing and Suggestion for Rehearing En Banc filed with this court on May 27, 2009. The response shall not exceed 15 pages or 4200 words and shall be filed within 21 days of the date of this order. Parties who are registered for ECF must file the response electronically without submission of paper copies. Parties who are not**

registered ECF filers must file the original response plus 50 paper copies. [6957462] (AF)

07/14/2009 40 Filed (ECF) Appellants County of Los Angeles, Robert J. Lawrence and Curt Messerschmidt response to Combo PFR Panel and En Banc (ECF Filing), for panel and en banc rehearing (statistical entry),Combo PFR Panel and En Banc (ECF Filing) for panel and en banc rehearing, Order, Order to set response by any party to anything. Date of service: 07/14/2009. [6991137]. – [COURT replaced document with searchable version – 07/15/2009 by MA] (EPR)

10/02/2009 41 Filed Order for PUBLICATION (KOZINSKI, Chief Judge) Upon the vote of a majority of nonrecused active judges, it is ordered that this case be reheard en banc pursuant to Circuit Rule 35-3. The three-judge panel opinion shall not be cited as precedent by or to any court of the Ninth Circuit. Judge Pregerson did not participate in the deliberations or vote in this case.[7082182] (RP)

10/22/2009 48 Submitted (ECF) Amicus brief for review and filed Motion to become amicus curiae. Submitted by The National Rifle Association of America and The California Rifle & Pistol Association. Date of service: 10/22/2009. [7104488] – [COURT

| | | |
|---|---|---|
| | | UPDATE: Attached motion from deleted entry [47]. 10/22/2009 by MA] (CDM) |
| 10/23/2009 | 49 | Submitted (ECF) Amicus brief for review and filed Motion to become amicus curiae. Submitted by Notice of Errata. Date of service: 10/23/2009. [7106450] (CDM) |
| 10/26/2009 | 51 | Filed order (ALEX KOZINSKI): The National Rifle Association and California Rifle Pistol Association's motion to file an amicus brief is granted. [7107367] (AF) |
| 10/30/2009 | 53 | Filed clerk order: The National Rifle Association of America and California Rifle Pistol Association amicus brief [48]. Within 7 days of the filing of this order, filer is ordered to file 30 copies of the brief in paper format, with a green cover, accompanied by certification, attached to the end of each copy of the brief, that the brief is identical to the version submitted electronically. The filer is also ordered to file 30 copies of the notice of errata to the amicus brief in paper format. [7113913] (RR) |
| 12/14/2009 | 60 | ARGUED AND SUBMITTED TO ALEX KOZINSKI, PAMELA ANN RYMER, BARRY G. SILVERMAN, SUSAN P. GRABER, RAYMOND C. FISHER, RICHARD C. TALLMAN, JOHNNIE B. RAWLINSON, JAY S. |

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| | BYBEE, CONSUELO M CALLAHAN, MILAN D. SMITH, JR. and SANDRA S. IKUTA. [7163354] (GB) |
| 08/24/2010 61 | FILED OPINION (ALEX KOZINSKI, PAMELA ANN RYMER, BARRY G. SILVERMAN, SUSAN P. GRABER, RAYMOND C. FISHER, RICHARD C. TALLMAN, JOHNNIE B. RAWLINSON, JAY S. BYBEE, CONSUELO M. CALLAHAN, MILAN D. SMITH, JR. and SANDRA S. IKUTA) AFFIRMED. Judge: BGS Dissenting, Judge: CMC Dissenting, Judge: SSI Authoring. FILED AND ENTERED JUDGMENT. [7449623] (RP) |

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COUNTY OF LOS ANGELES, LOS ANGELES COUNTY SHERIFF'S DEPARTMENT, SHERIFF LEROY BACA, SCOTT WALKER, RICK RECTOR, DONALD NICHIPORUK, RICHARD SCHLEGEL, (erroneously sued as M. SCHLEGEL), DEPUTY BRICE STELLA (erroneously sued as D. STELLA), JACK DEMELLO, (erroneously sued as J. DERNELLO), DAVID O'SULLIVAN, JAMES RITENOUR, IAN STADE, ROBERT J. LAWRENCE and CURT MESSERSCHMIDT

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

| | |
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| AUGUSTA MILLENDER, BRENDA MILLENDER, WILLIAM JOHNSON,<br><br>Plaintiff,<br><br>vs.<br><br>COUNTY OF LOS ANGELES, LOS ANGELES COUNTY | Case No.<br>CV 05-2298 DDP (RZx)<br>**APPENDIX OF DECLARATIONS AND EXHIBITS IN SUPPORT OF DEFENDANTS' NOTICE OF MOTION AND MOTION FOR SUMMARY** |

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| SHERIFF'S DEPARTMENT, LEROY BACA; et al.<br><br>Defendants. | **JUDGMENT AND/OR SUMMARY ADJUDICATION OF ISSUES (Motions 1 and 2)**<br><br>(Filed Sep. 18, 2006)<br><br>**Date:**<br>**October ~~16~~ [23], 2006**<br>**Time: 10:00 a.m.**<br>**Courtroom: "3"** |

* * *

[Pleading Omitted; Relevant Exhibits Attached]

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## [ER 68] DECLARATION OF CURT ALAN MESSERSCHMIDT

I, Curt Alan Messerschmidt, declare as follows:

1. I am one of the defendants named in this lawsuit. I have personal knowledge of the facts and statements set forth in this declaration, and if called upon to testify, I could and would competently testify thereto.

2. I began working for the Los Angeles County Sheriff's Department in May of 1989. In March of 2001, I was assigned to Safe Streets Bureau, Lennox Sheriff's Station, as a Gang Investigator. This was a specialized unit, investigating gang related crimes and arresting gang members for various violations of the law. I have attended hundreds of hours of instruction on the dynamics of gangs and gang trends. I am

a member of a Los Angeles based gang investigators association, which shares current gang intelligence with county, municipal, and federal law enforcement agencies on a regular basis. I am currently working as a detective in Palmdale.

3. Beginning February 1995, I was a Patrol Deputy, assigned to Lennox Sheriff's Station for six years. I was involved in hundreds of gang related incidents, contacts, and or arrests during that time. I attended the Los Angeles Sheriff's Academy for approximately twenty weeks, at which time I received in excess of forty hours of training pertaining to gang related crimes, including but not limited to the investigation of gang related shootings. I have received specialized training in the field of gang related crimes from my Field Training Officer during six months of Patrol Training and an additional 18 hours of training at Patrol School. I have also received personalized instruction from Lennox Gang Detectives while working at Lennox Station. I received approximately 16 hours of search warrant and informant management training.

4. From 1991 to 1995, I worked for approximately four and a half years in a custody assignment, during which time I interviewed hundreds of individuals who were both sentenced and pre-sentenced on various gang related charges. During the course of these interviews, I obtained information pertaining to manners in which gang related assaults are committed, the motives for such assaults, and the concealment of weapons [ER 69] used in such assaults.

I have also participated in the investigation and/or arrests of over 290 individuals related specifically to gang related crimes. During this time, I spoke to law enforcement officers, experts in the field of gang related crimes, and suspects who have committed gang crimes. I have assisted Los Angeles County Sheriff's Homicide Investigators approximately twenty gang-related murders, and I have testified as an arresting officer and as a gang expert for the aforementioned crimes in the Los Angeles Superior Courts.

5. On November 6, 2003, at approximately 0500 hours, the Special Enforcement Bureau ("SEB") Blue Team served a high-risk search and arrest warrant at 2234 E. 120th Street ("120th Street location") in the City of Los Angeles. I prepared the search warrant that was executed on November 6, 2003, in connection with an assault with a deadly weapon charge which occurred on October 17, 2003. It was reported me by Shelly Kelly that during the October 17, 2003 incident, the suspect, Jerry Ray Bowen, had a physical confrontation with his former girlfriend, Shelly Kelly, in which he bit her, attempted to throw her from a second story balcony, and eventually fired at her with a sawed-off shotgun as she fled the scene. The October 17, 2003 incident took place at 1425 W. 97th Street in Los Angeles ("W. 97th location.") Based on my investigation, I believed that Bowen, the suspect for the assault, lived at the 120th Street address where the warrant was executed.

6. Prior to service of the warrant on November 6, 2003, I was assigned to investigate the Bowen/

Kelly assault case. Before meeting with Ms. Kelly, I reviewed the incident report and a supplemental report prepared by Deputy Hector Garcia regarding the assault incident. Attached hereto as Exhibit A is a true and correct copy of the Incident Report re assault with a deadly weapon, written by Deputy H. Garcia, Report No. 403-10148-0371-051. Attached hereto as Exhibit B is a true and correct copy of the Supplemental Incident Report. I learned the following information about the October 17, 2003 incident:

7. During the October 17, 2003 incident, Ms. Kelly had called the Sheriff's [ER 70] Department to stand by while she moved her belongings out of the apartment she shared with Jerry Bowen. Ms. Kelly said that due to Mr. Bowen's violent temper and some previous physical assaults on her by Mr. Bowen, she decided to break off the relationship and move out of the W. 97th location. Because of Mr. Bowen's violent nature, and Ms. Kelly being fearful for her safety, she contacted Lennox Sheriff's Station and requested deputies to watch over her while she gathered some of her property from her residence at the W. 97th location. Upon the deputies' arrival, Ms. Kelly began to retrieve her property and place it into her vehicle.

7a. Approximately twenty minutes after the deputies arrived, the deputies were assigned an emergency call of a child not breathing. The deputies advised Ms. Kelly that they had to leave, but would return after handling of the call. Ms. Kelly stated that as soon as the deputies left the location, Mr. Bowen appeared at the bottom of the stairs and

stated, "I told you to never call the cops on me, bitch!" The suspect advanced up the stairs and grabbed the front of Ms. Kelly's shirt with both his hands. Ms. Kelly and Mr. Bowen became involved in a physical altercation, with Mr. Bowen attempting to throw Ms. Kelly over the top railing of the second story landing. Ms. Kelly, who was able to keep herself from being thrown over the railing, was grabbed again by Mr. Bowen, who proceeded to bite her on the rear of the right shoulder. Mr. Bowen also grabbed Ms. Kelly by the hair and attempted to drag her into the residence at the W. 97th location.

8. Ms. Kelly, fearing for her personal safety, and to keep herself from being dragged into the location, sat down on the ground, and straddled the doorway with her legs. Mr. Bowen then grabbed both of the [sic] her arms, at which time she was able to pull out of her shirt, and run to her vehicle. Within seconds, Mr. Bowen emerged from the location holding a black sawed off shotgun with a pistol grip and began running toward Ms. Kelly. Mr. Bowen ran to the front of Ms. Kelly's vehicle and pointed the shotgun at her, stating, "If you try to leave, I'll kill you, bitch!" Ms. Kelly leaned over in her seat and pushed the gas pedal all the way down. She saw Mr. Bowen jump out of the way [ER 71] of the vehicle and fire one round at her, damaging her vehicle. Ms. Kelly continued driving westbound 97th Street toward Halldale Avenue and could see Mr. Bowen chasing her on foot and firing the shotgun approximately four more times in her direction. Ms. Kelly was able to drive away and located police officers a short time later.

9. While deputies were interviewing Ms. Kelly at her residence, they immediately recognized the victim and location, as the same individual and address they had left earlier. Ms. Kelly also provided four photographs of the suspect to aid the deputies in their investigation.

10. In conducting the follow-up investigation of the Bowen/Kelly assault case, on October 22, 2003, I spoke to the victim, Shelly Kelly, on the phone. I told Ms. Kelly that I was the investigator on her case and needed to speak with her regarding the assault incident.

11. I also ran Jerry Bowen's name through the computer systems. I ran his rap sheet and criminal history on the California Law Enforcement Teletype System ("CLETS") to see what type of criminal history the suspect had. Mr. Bowen had a very violent history, including multiple felony arrests and misdemeanor arrests.

12. I met with Ms. Kelly at the Lennox Sheriff's station. My interview with Ms. Kelly was videotaped. A true and correct copy of the videotape is attached hereto as Exhibit O. I reviewed the incident report with Ms. Kelly, and verified the facts of the incident with her. Ms. Kelly told me that she believed Mr. Bowen was staying at or hiding out at the 120th Street address, with his foster mother. Ms. Kelly told me that Mr. Bowen was not staying with her on the 97th Street address, and that he was staying at the 120th street address. During one of my phone calls

with Ms. Kelly, she told me that she had been to the Millenders' house with Jerry Bowen prior to the assault. This was one more piece of information that led me to believe that Mr. Bowen could be at the 120th street address. Ms. Kelly also stated she had been told by her neighbors that Mr. Bowen had been seen coming back to the 1425 W. 97th Street address. I went to the W. 97th location a week or two prior to the search warrant and verified that Bowen [ER 72] was not staying at that location. I drove to the apartment complex, walked around the area, asked the neighbors if they had seen Bowen, and they said they had not.

13. In my training, police officers are taught that the successful use of informants is critical in developing accurate information pertaining to a case. Police officers are taught that informants are information providers who could be a citizen, victim, witness, paid informant or a subject charged with a crime. In this case, the informant who provided information on where the suspect was residing was the victim, Shelly Kelly. Ms. Kelly told me on two occasions that the suspect was residing at the 120th Street address which she knew to be the suspect's foster mother's residence. I wrote the 120th Street address information on the report during the interview with Ms. Kelly after she told me the suspect resided there. After reviewing my handwriting on the report, in which I wrote down the number 2034, which is the number Ms. Kelly gave me, I realized that 2034 was incorrect, and that the correct number

was 2234. Attached hereto as Exhibit J is a true and correct copy of the report on which the 2034 number appears.

14. The only other address that was a possibility for Bowen to be residing was the 97th Street address where the assault occurred. I did not believe that Bowen resided at the 97th Street address because Ms. Kelly had told me he was living with his foster mother at the 120th Street address. Ms. Kelly gave me a citation that had Bowen's license plate number to the motorcycle he was using. I do not remember what the address on the citation was.

15. I took photographs of the bruises and bite mark on Ms. Kelly. I reviewed the incident report with Ms. Kelly to make sure the information was correct. I also reviewed the photographs that Ms. Kelly had given the deputies that evening.

16. Prior to meeting with Ms. Kelly, I had placed a photo of Jerry Ray Bowen into a "six pack" line up. After Ms. Kelly had substantiated the events that took place during the assault, and prior to showing her the photo line up, I advised Ms. Kelly of the "Witness Admonition Mug Show Ups" form. Ms. Kelly signed the bottom of the form. [ER 73] Attached hereto as Exhibit C is a true and correct copy of the admonition signed by Ms. Kelly on October 22, 2003.

17. I showed the photo line up containing the photo of Jerry Ray Bowen to Ms. Kelly. I had Ms. Kelly circle the individual she identified and sign her name below the photograph. The person Ms. Kelly

identified was Jerry Ray Bowen, a known Mona Park Crip gang member.

18. The day after the videotaped interview, Ms. Kelly contacted me and said she had spoken with a witness, Gerry Floyd, and that he was willing to come forward and provide a statement. The following day, on October 23, 2003, I interviewed Mr. Floyd at the Lennox station. Mr. Floyd stated that at the time of the incident, he saw the suspect, Mr. Bowen, run up the stairs at the 97th Street location and grab Ms. Kelly by the blouse and hit her. Mr. Floyd stated that he saw a verbal altercation by the suspect followed by a physical altercation in which Bowen grabbed Ms. Kelly by the blouse. Floyd stated that Ms. Kelly broke loose from Bowen at which time Bowen went inside the house and came down the stairs with a gun. Floyd then saw Bowen fire two rounds at Ms. Kelly from a 12-gauge sawed-off shotgun with a pistol grip. Floyd then observed the suspect chase Kelly as she drove away from the location. Floyd said that the landlady at the 97th Street address said she was going to put a new lock on the door.

19. Prior to showing Mr. Floyd the photo line up, I advised Mr. Floyd of the "Witness Admonition Mug Show Ups" form. Mr. Floyd signed the bottom of the form. Mr. Floyd then picked out Jerry Bowen from the "six pack" line-up. Attached hereto as Exhibit D is a true and correct copy of the admonition signed by Mr. Floyd on October 23, 2003.

20. I prepared a supplemental report regarding the interviews I had conducted with Ms. Kelly and Mr. Floyd and began doing further research, trying to verify if this address on 120th Street was a good address for Mr. Bowen. Attached hereto as Exhibit I is a true and correct copy of my supplemental report.

21. I conducted an extensive background search on the suspect, Mr. Bowen, [ER 74] by utilizing departmental records, state computer records, and other police agency records. Based on this extensive search and information provided by Ms. Kelly, I determined that Mr. Bowen resided at 2234 E. 120th Street, Los Angeles, California. My determination was based upon specific address information provided by Ms. Kelly. Ms. Kelly stated she had an ongoing dating relationship with the suspect for about five to six months, and that he also had his own set of keys to her apartment on the 97th Street address. She also said she had been over at the 120th Street address with him prior to the assault. She stated that the 120th street address was Bowen's foster mother's home. In addition, I checked information about Mr. Bowen from DMV records, Cal-Gangs data entries and California criminal history records for Mr. Bowen. I checked the DMV records and Cal-gangs records to verify that the date of birth for Mr. Bowen matched. I also checked Bowen's name on the National Criminal Index Center.

22. I conducted research to verify if the address on 120th Street was a good address for Bowen. I did a computer search of records to verify Bowen's name,

address and date of birth. I checked the Consolidated Criminal History Reporting System ("CCHRS"). The CCHRS indicated that Bowen was on summary probation for spousal battery and driving on an unlicensed driver charge. I also checked Bowen's DMV records. I obtained information about Mr. Bowen's address from his DMV records. Although the DMV records indicated that as of 9/3/03, Mr. Bowen's address was the 97th Street address, the DMV records also indicated that as of 3/27/03 Mr. Bowen's address was the 120th Street address. The 120th Street address was much more believable as his current address because Ms. Kelly had just told me that was his address. Also, it did not make any sense to me that Bowen would remain living at a location in which he had committed an assault with a deadly weapon which the police had investigated. I had a good basis for believing that the 120th Street address was where Bowen was currently living since Ms. Kelly had told me Bowen was staying at the 120th Street address with his foster mother. In addition, I checked Bowen's name on the Cal Gangs record. Bowen's name on the Gang Member Subject File Report [ER 75] indicates that Bowen verbally told the Century deputies that his address as of May 17, 2003 was the 120th Street address. On November 3, 2003, I ran a search on the County Warrant System ("CWS"). I also spoke with Sgt. Frank Carey at Century OSS to see if he was familiar with this location. Carey was familiar with the house and it was known to the station as a problem house. Attached hereto as Exhibit F is a true and correct copy of the DMV

report, and Exhibit G is a true and correct copy of the Gang Member Subject File Report. Attached hereto as Exhibit H is a true and correct copy of the Consolidated Criminal History Reporting System relating to Mr. Bowen.

23. I also ran Bowen's name to see if he was on probation or parole and found out that Bowen was on summary probation for spousal battery and driving on an unlicensed driver charge.

24. After I interviewed everybody and did all the computer checks, I started gathering all my information and prepared my search warrant affidavit for the issuance of an arrest warrant for Bowen and a search warrant for the 120th Street residence. Based on the information I obtained from my computer checks, coupled with the fact that the suspect had been identified and was known personally by Ms. Kelly as the person who physically assaulted and later shot at her, I requested a Ramey Warrant be issued for Jerry Ray Bowen for his involvement in the assault crimes. The warrant affidavit was reviewed and approved by Sergeant Lawrence, my team sergeant at Lennox Operation Safe Streets, and Lieutenant Ornales. Deputy District Attorney Janet Wilson also reviewed and approved the warrant, and I was present during her review and I witnessed her signing her approval of the warrant on November 4, 2003. Everything I wrote on the warrant affidavit was truthful and accurate based on my investigation of the facts in this case. In the affidavit, I stated I had conducted an extensive background search on the

suspect by utilizing departmental records, state computer records, and other police agency records and had determined that the suspect lived at the 120th Street location. This statement, and all the statements on the affidavit, were truthful and accurate based on my investigation of the facts in this case. Attached [ER 76] hereto as Exhibit E is a true and correct copy of the Search Warrant and Affidavit which were signed by Judge Eudon Ferrell on November 4, 2003.

25. I requested that the Search Warrant be endorsed for night service due to the fact that the investigation had shown that the primary suspect in this case had gang ties to the Mona Park Crip gang based on information provided by Ms. Kelly and the Cal-gang data base. Also, I believed the nature of the crime – assault with a deadly weapon – showed that night service would provide an added element of safety to the community, as well as for the deputy personnel serving the warrant, based on the element of surprise. The request for SEB service of the warrants was based upon several factors. Bowen was a known Mona Park Crip gang member and 'Three-Strike' candidate with an extensive criminal background that included numerous assault and weapons charges, the door was fortified with security bars, and a sawed-off shotgun was used in the commission of the crime. Additional information indicated that other persons associated with the home, the Millender family members, were active Mona Park Crip gang members. After my review of Bowen's criminal history and

my discussions with Kelly and Floyd, I formed the opinion that Bowen was an active "Mona Park Crip" gang member and a very dangerous person. In fact, Bowen's prior felony convictions caused him to be a "third strike candidate" pending his conviction of the crimes he allegedly perpetrated against Kelly. Due to Bowen's history of violence, his use of a firearm and his prior felony convictions, I believed that the warrant service classification should escalate from "lower-risk" to "high-risk." Also, I later determined that the warrant location had a metal security door. Therefore, as a result of my knowledge regarding Bowen and the warrant location, I believed that the criteria for "high-risk" had been satisfied. On November 3, 2003, I consulted with Lt. Maxwell of the LASD SEB SWAT team. As a result of my consultation with Lt. Maxwell, the SEB SWAT team's Blue Team, under team leader Sgt. Walker, was requested to assist LASD Lennox OSS with the warrant service at the 120th Street location.

26. I also believed that the items sought in the search warrant would be in the [ER 77] possession of Mr. Bowen and the recovery of the weapon could be invaluable in the successful prosecution of the suspect involved in this case, and the curtailment of other crimes being committed. The items sought in the search warrant were:

> "All handguns, rifles, or shotguns of any caliber, or any firearms capable of firing ammunition, or firearms or devices modified or designed to allow it to fire ammunition. All

caliber of ammunition, miscellaneous gun parts, gun cleaning kits, holsters which could hold or have held any caliber handgun being sought. Any receipts or paperwork, showing the purchase, ownership, or possession of the handguns being sought. Any firearm for which there is no proof of ownership. Any firearm capable of firing or chambered to fire any caliber ammunition."

"Articles of evidence showing street gang membership or affiliation with any Street gang to include but not limited to any reference to "Mona Park Crips", including writings or graffiti depicting gang membership, activity or identity. Articles of personal property tending to establish the identity of person in control of the premise or premises. Any photographs or photograph albums depicting persons, vehicle, weapons or locations, which may appear relevant to gang membership, or which may depict the item being sought and or believed to be evidence in the case being investigated on this warrant, or which may depict evidence of criminal activity. Additionally to include any gang indicia that would establish the persons being sought in this warrant, affiliation or membership with the "Mona Park Crips" street gang.

27. I stated in the warrant affidavit that I believed the items sought will be in the possession of Jerry Ray Bowen and the recovery of the weapon could be invaluable in the successful prosecution of

the suspect involved in this case, and the curtailment of further crimes being committed. This statement was truthful and accurate based on my investigation of the facts in this case.

[ER 78] 28. I obtained an arrest warrant for Mr. Bowen as well as a search warrant for the residence.

29. On November 3, 2003, I contacted Lt. Maxwell at SEB and told him that based on my preparation check sheet and the nature of the crime, I believed that a SWAT team would be required to execute the warrant because it was considered high risk. I had a briefing with the LASD SEB SWAT team. At that briefing, I went over the history of the incident, the suspect's record, and the photographs of the 120th Street location which I had taken several days before the warrant was served.

30. The warrant service mission was assigned to the SEB SWAT team's blue team under the direction of SWAT team leader Sergeant Walker.

31. On November 6, 2003, at approximately 0500 hours, the SEB Blue Team served the search and arrest warrant at the 120th Street location. I was positioned in the middle of the street to the east of the location with Det. Pickett in order to stop traffic.

32. On November 6, 2003, I heard the SWAT team play a pre-recorded announcement over the public address system from one of the tactical vehicles that the SWAT team uses. They identified themselves as deputies, stated their intent to serve a

search warrant and demanded entry into the home. In addition, several verbal announcements were also made at the front door by the entry team.

33. As people started to come out of the house, I was requested by SWAT to move up in order to watch the people who had come out of the house. Det. Pickett and I moved to the driveway. I saw, coming out of the house Augusta, Brenda, and William Johnson, and some other individuals. Det. Pickett escorted Brenda and Augusta to the car because they were cold. I maintained security on all these people until the location was cleared by SEB. I heard August [sic] Millender request to use the restroom, and Det. Pickett told her as soon as the house was secured by SEB, we would escort everyone back inside and she would be allowed to use the restroom. She got up out of the back [ER 79] seat of the car, pulled up her nightgown, and urinated on the ground.

34. Once SEB left the house, I went into the house and gave the search warrant to Sgt. Lawrence who gave a copy of the warrant to Augusta Millender. The following investigators searched the house: Dets. Faulkner, Ortega, Pickett, Valento, Cale and Bercini. When the search was over, I gathered the pieces of evidence we were taking, had the property receipt signed, and we left.

35. The following evidence was recovered from the search of the 120th Street residence: 1) a State of California Social Services letter addressed to the suspect, Jerry Bowen; 2) 1-shotgun, Mossberg 12

gauge, black in color with wooden stock serial No. J324807; 3) 1 box of .45 cal "American Eagle" rounds. The primary weapon sought (shotgun) was not found at the location. Attached hereto as Exhibit K is a true and correct copy of the Los Angeles County Sheriff's Dept.'s Return to Search Warrant, itemizing property seized at 2234 E. 120th Street, Bates Stamp No. SEB 0386.

36. We did not find Bowen at the Millender house. However, Det. Bercini recovered evidence that indicated Bowen had lived at the 120th Street location. This evidence was a letter regarding a medical appointment that was sent from the State of California in June of 2003 to Bowen at the 120th Street address. Additionally, as per the search warrant affidavit, which authorized search and seizure of all handguns, rifles and/or shotguns of any caliber that may be found at the warrant location, Det. Ortega recovered a "Mossberg" shotgun and Det. Bercini recovered a box of .45 caliber ammunition.

37. I have no knowledge that any injuries were reported to S.E.B. SWAT personnel arising from the search of the 120th Street location.

38. On November 19, 2003, I, along with the Major Crimes Fugitive Taskforce, conducted a surveillance of 1425 West 97th Street. During that surveillance, I contacted Kelly and received additional information as to the possible whereabouts of Bowen. That information included Bowen's mother-in-law's residence at 4127 Dalton Avenue in Los

Angeles and an unknown motel in the area of 41st Street and Figueroa Avenue [ER 80] in Los Angeles. Bowen was found at a motel, and was arrested, and later convicted of assault with a deadly weapon arising out of this incident.

39. The preparation and execution of the search warrant had nothing to do with the Millenders' race.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on this 12th day of September, 2006, at Los Angeles, California.

/s/ CAM
Curt Alan Messerschmidt

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DT] PAGE 1 OF 3

| 10148 | 0371 | 051 |
|---|---|---|
| SEQUENTIAL | REPORTING DISTRICT | STAT CODE |

SEX OFFENSE VICTIM INFO YES ☐ NO ☒

DOMESTIC VIOLENCE
☐ NON-PERSONAL (GUN, KN/PE, ETC.)
☐ PERSONAL (HANDS, FEET, FISTS, ETC.)

INJURY
☐ MAJOR ☐ MINOR ☐ NONE
☐ NON-CRIMINAL

| NIC ORIGIN | DOB | AGE | |
|---|---|---|---|
| 5204 | [DOB OMITTED] | 38 | |
| | RES. PHONE (Area Code) | DAY PHONE | |
| | 323-733-1660 | ➡ | X |
| | BUS. PHONE (Area Code) | DAY PHONE | |
| | | ➡ | |
| ETHNIC ORIGIN | DOB | AGE | |
| | RES. PHONE (Area Code) | DAY PHONE | |
| | | ➡ | |
| | BUS. PHONE (Area Code) | DAY PHONE | |
| | | ➡ | |
| ETHNIC ORIGIN | DOB | AGE | |
| | RES. PHONE (Area Code) | DAY PHONE | |
| | | ➡ | |
| | BUS. PHONE (Area Code) | DAY PHONE | |
| | | ➡ | |

TER 101 **EXHIBIT A**

MONA PARK OSS

MONA PARK CRIP COUNTY OF LOS ANGELES SHERIFF'S DEPARTMENT

A TRADITION OF SERVICE INCIDENT REPORT DATE 10-18-03 (MESSERSCHMIDT) PAGE 1 OF 3

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|---|---|---|---|---|---|---|---|---|---|
| ACTIVE ☒ | NON-CRIMINAL ☐ | # OF ADULT ARRESTS | # OF SUBJECT DETENTIONS | URN # | 1 | 03 | 10148 | 0371 | 031 |
| INACTIVE ☐ PENDING ☐ | | 0 | 0 | | DETENTION | YEAR | SEQUENTIAL | REPORTING DISTRICT | STAT CODE |

CLASSIFICATION 1/LEVEL/STAT CODE

ASSAULT WITH A DEADLY WEAPON (FIREARM) 245(A)(2) PC/F/051

CLASSIFICATION 2/LEVEL/STAT CODE

SPOUSAL BATTERY 243(E)(1) PC/M/146

CLASSIFICATION 3/LEVEL/STAT CODE

SEX OFFENSE VICTIM INFO YES ☐ NO ☒

DOMESTIC VIOLENCE

☐ NON-PERSONAL (GUN, KN/PE, ETC.)

☐ PERSONAL (HANDS, FEET, FISTS, ETC.)

DATE/TIME OF OCCURRENCE
10-17-03 2350 HRS. FRIDAY

PRINTS REQUESTED ☐ BY TIME

COMPLETED ☐

INJURY
☐ MAJOR ☐ MINOR ☐ NONE

LOCATION OF OCCURRENCE
1425 W. 97TH ST. LA

BUS. NAME

☐ NON-CRIMINAL

CODES: V-VICTIM W-WITNESS I-INFORMANT R-REPORTING PARTY P-PARTY

| CODE | # OF | L NAME | F NAME | M NAME | SEX | RACE | ETHNIC ORIGIN | DOB | AGE |
|---|---|---|---|---|---|---|---|---|---|
| V | 1 OF 1 | KELLY, | SHELLY | | F | B | C1553204 | (DOB OMITTED) | 38 |

| | | | | | |
|---|---|---|---|---|---|
| RES. ADDR. | CITY | ZIP | VICTIM OF OFFENSE(S) CLASSIFICATION # | RES. PHONE (Area Code) | DAY PHONE |
| 2[illegible]NSON AV | LOS ANGELES | 90018 | # 1 # # # # | 323-733-1080 | # X |
| BUS. ADDR. | CITY | ZIP | ENGLISH SPEAKING ☒ YES ☐ NO | BUS. PHONE (Area Code) | DAY PHONE # |
| UNEMPLOYED | | | | | |

| CODE | # OF | L NAME | F NAME | M NAME | SEX | RACE | ETHNIC ORIGIN | DOB | AGE |
|---|---|---|---|---|---|---|---|---|---|
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| RES. ADDR. | CITY | ZIP | VICTIM OF OFFENSE(S) CLASSIFICATION # | RES. PHONE (Area Code) | DAY PHONE |
| | | | # # # # # | | # |
| BUS. ADDR. | CITY | ZIP | ENGLISH SPEAKING ☒ YES ☐ NO | BUS. PHONE (Area Code) | DAY PHONE # |

| CODE | # OF | L NAME | F NAME | M NAME | SEX | RACE | ETHNIC ORIGIN | DOB | AGE |
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| RES. ADDR. | CITY | ZIP | VICTIM OF OFFENSE(S) CLASSIFICATION # | RES. PHONE (Area Code) | DAY PHONE |
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| BUS. ADDR. | CITY | ZIP | ENGLISH SPEAKING ☐ YES ☐ NO | BUS. PHONE (Area Code) | DAY PHONE # |

CODES: S-SUSPECT SJ-SUBJECT PA-PATIENT S/V-SUSPECT/VICTIM SJ/V-SUBJECT/VICTIM

| CODE | # OF | L NAME | F NAME | M NAME | DRIVERS LICENSE (State & No) |
|---|---|---|---|---|---|
| | 1 OF 1 | BOWEN, | JERRY | RAY | CA/4089040 |

| RES. ADDR. | CITY | ZIP | RES. PHONE (Area Code) |
|---|---|---|---|
| 142[illegible] W. 97TH ST. LA | LOS ANGELES 2034 E. 120TH ST. | 90047 | NO PHONE |
| BUS. ADDR. | CITY | ZIP | BUS. PHONE (Area Code) |
| UNEMPLOYED | | | |

| SEX | RACE | ETHNIC ORIGIN | HAIR | EYES | HGT. | WGT. | DOB | AGE |
|---|---|---|---|---|---|---|---|---|
| M | B | | BLK | BRO | 510 | 205 | [DOB OMITTED] | 34 |

| CHARGE | WHERE DETAINED OR CITED |
|---|---|
| | -NIC- |
| AKA 56888 MONIKER C.J. | Booking # 2 |

| CODE | L NAME | F NAME | M NAME | DRIVERS LICENSE (State & No) |
|---|---|---|---|---|
| | | | | |

| RES. ADDR. | CITY | ZIP | RES. PHONE (Area Code) |
|---|---|---|---|
| | | | |
| BUS. ADDR. | CITY | ZIP | BUS. PHONE (Area Code) |
| | | | |

| SEX | RACE | ETHNIC ORIGIN | HAIR | EYES | HGT. | WGT. | DOB | AGE |
|---|---|---|---|---|---|---|---|---|
| | | | | | | | | |

| CHARGE | WHERE DETAINED OR CITED |
|---|---|
| | |
| AKA MONIKER | Booking # |

| VEHICLE # | SUSPECT | STATUS ☐ IMPOUNDED | LICENSE (STATE & NO.) | YEAR | MAKE | MODEL | BODY TYPE | COLOR |
|---|---|---|---|---|---|---|---|---|
| #1 | VICTIM | ☐ STORED ☐ OUTSTANDING | CA/2VHR532 | 90 | FORD | TAURUS | 4DR | WHT |

| REGISTERED OWNER | IDENTIFYING FEATURES | CHP 180 SUBMITTED | GARAGE NAME & PH. |
|---|---|---|---|
| MARY WILLIAMS | | ☐ YES ☒ NO | |

| BY DEP. | EMPLOYEE # | VACATION DATES | DEP. | EMPLOYEE # | VACATION DATES |
|---|---|---|---|---|---|
| H. GARCIA | 428735 | | P. LOMBARDO | 411742 | |

| STATION | UNIT/CAR | SHIFT | APPROVED | EMPLOYEE # | DATE | TIME |
|---|---|---|---|---|---|---|
| LENNOX | 31 | EM | SGT. K. ANDERSON | 111652 | 10-18-03 | 0435 |

| VICTIM DESIROUS OF PROSECUTION ☒ YES ☐ NO | ASSESSMENT |
|---|---|
| | LENNOX DETECTIVE BUREAU |

| NOTIFICATION REQ. DEP | DATE-TIME | SPECIAL REQUEST DISTRIBUTION |
|---|---|---|
| ☐ YES ☒ NO | | F.A.I.R. / O.S.S. |

| SUSP/SUBJ RELEASE APPROVED BY | TIME | PCD SUBMITTED | TT B/C By | DATE |
|---|---|---|---|---|
| | | ☐ YES ☒ NO | | 10/18/03 |

| R 102 | DATE | TIME RECEIVED | | URN # | |
|---|---|---|---|---|---|
| | 18-03 | 2357 | 236 | 403-10148-0371-051 | PAGE 2 OF 3 |

| PUT CHECKED NCIC, CH, ETC.: | EVIDENCE HELD: | EVIDENCE ENTERED IN PATROL | NARCOTICS | SAFE | BY |
|---|---|---|---|---|---|
| YES ☒ NO | ☒ YES ☐ NO | 185/67 | | | LOMBARDO |

| EVIDENCE HELD: | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|
| ☐ BLOOD | ☐ BULLET | ☐ BULLET CASINGS | ☐ CHECKS | ☐ CLOTHES | ☐ CREDIT CARDS | ☐ ELECTRONIC EQUIPMENT | ☐ FINGERPRINTS | | |
| ☐ FOOTPRINTS | ☐ FRAUD DOCUMENTS | ☐ GSR | ☐ HAIR | ☐ JEWELRY | ☐ MISCELLANEOUS | ☐ MONEY | ☐ NARCOTICS | | |
| ☐ OTHER PRINTS | ☐ PAINT | ☒ PHOTOGRAPHS | ☐ RAPE KIT | ☐ RECEIPTS | ☐ TOOLS | ☐ URINE | ☐ VEHICLE IMPOUNDED | | |
| ☐ VEHICLE PARTS | ☐ WEAPONS | ☐ | | | | | | | |

| PROPERTY CODE: | S-STOLEN R-RECOVERED L-LOST F-FOUND E-EMBEZZLED D-DAMAGED EV-EVIDENCE (Use all applicable Codes: for example, if property is both Stolen and Recovered, Code is S/R) | | | | |
|---|---|---|---|---|---|
| CODE | ITEM # | QUAN. | DESCRIPTION (Include kind of article, trade name, identifying numbers, physical description, material, color, condition, age and present market value) | RELEASED TO SERIAL # | VALUE |
| EV | 1 | 4 | PHOTOS DEPICTING THE SUSPECT | | |
| EV | 2 | 1 | POLAROID PHOTO DEPICTING DAMAGE TO VICTIMS CAR | | |

PART I STATISTICAL INFORMATION

| PROPERTY | | | | | |
|---|---|---|---|---|---|
| TYPE OF PROPERTY | STOLEN | RECOVERED | TYPE OF PROPERTY | STOLEN | RECOVERED |
| CLOTHING/FURS | $ | $ | JEWELRY | $ | $ |
| CONSUMABLE GOODS | $ | $ | LIVESTOCK | $ | $ |
| CURRENCY/NOTES | $ | $ | LOCAL STOLEN VEHICLES | $ | $ |
| FIREARMS | $ | $ | MISCELLANEOUS | $ | $ |
| HOUSEHOLD GOODS | $ | $ | OFFICE EQUIPMENT | $ | $ |
| | | | TV/RADIO/STEREO | $ | $ |

VICTIM OF SEX CRIMES REQUEST FOR CONFIDENTIALITY

PURSUANT TO SECTION 293(a) OF THE CALIFORNIA PENAL CODE, YOU ARE INFORMED THAT YOUR NAME WILL BECOME A MATTER OF PUBLIC RECORD, UNLESS YOU REQUEST THAT IT REMAIN CONFIDENTIAL AND NOT BE A PUBLIC RECORD, PURSUANT TO SECTION 625-1 OF THE GOVERNMENTAL CODE.

I _____ HEREBY (DO) (DO NOT) ELECT TO EXERCISE MY RIGHT TO PRIVACY.

SCREENING FACTORS

| YES | NO | | YES | NO | |
|---|---|---|---|---|---|
| ☐ | ☐ | 1. SUSPECT IN CUSTODY | ☒ | ☐ | 7. GENERAL SUSPECT DESCRIPTION |
| ☒ | ☐ | 2. SUSPECT NAMED/KNOWN | ☐ | ☒ | 8. GENERAL VEHICLE DESCRIPTION |
| ☒ | ☐ | 3. UNIQUE SUSPECT IDENTIFIERS | ☐ | ☒ | 9. UNIQUE M.O. OR PATTERN |
| ☐ | ☒ | 4. VEHICLE IN CUSTODY | ☐ | ☒ | 10. SIGNIFICANT PHYSICAL EVIDENCE |
| ☐ | ☒ | 5. UNIQUE VEHICLE IDENTIFIERS | ☐ | ☒ | 11. TRACEABLE STOLEN PROPERTY |
| ☐ | ☒ | 6. WRITER/REVIEWER DISCRETION | ☐ | ☒ | 12. MULTIPLE WITNESSES |

[ER 103] COUNTY OF LOS ANGELES
SHERIFF'S DEPARTMENT
INCIDENT REPORT– NARRATIVE

URN 403-10148-0371-015 PAGE 3 of 3

WE RESPONDED TO THE INDICATED LOCATION IN REGARDS TO A KEEP THE PEACE CALL, TAG-226. THE VICTIM WAS MOVING OUT OF THE APARTMENT SHE SHARED WITH HER EX-BOYFRIEND (THE SUSPECT) AND WANTED US TO STAND BY WHILE SHE RETRIEVED HER PROPERTY. SHE WAS AFRAID THAT HER EX-BOYFRIEND WHO WAS STILL LIVING AT THE LOCATION, WOULD GIVE HER A HARD TIME ABOUT MOVING OUT. THE SUSPECT WAS NOT AT HOME AND THE VICTIM BEGAN TO MOVE HER PROPERTY OUT.

AFTER APPROXIMATELY TWENTY MINUTES, WE HAD TO RESPOND TO A CHILD NOT BREATHING CALL, T-234, AND A HOUSE ON FIRE CAL [sic], T-235. WE LEFT THE VICTIM AT THE LOCATION RETRIEVING HER PROPERTY. ON OUR WAY BACK TO 1425 97TH ST, WE RECEIVED A CALL INSTRUCTING US TO MEET WITH LAPD UNIT 12A69 (OFFICERS PONCE #36692 AND SPARKMAN #31327). THEY HAD BEEN FLAGGED DOWN BY A VICTIM OF AN ASSAULT. UPON OUR ARRIVAL WE RECOGNIZED THEIR VICTIM AS THE SAME WOMAN FROM 1425 97TH ST. WHO WE HAD JUST HELPED RETRIEVE HER PROPERTY.

SHE TOLD US THE FOLLOWING: IMMEDIATELY AFTER WE LEFT TO THE EMERGENT CALLS (T-234 & 235), THE SUSPECT APPEARED AT THE BASE OF THE STAIRS AND BEGAN YELLING AT THE VICTIM. HE WAS ANGRY BECAUSE SHE HAD CALLED THE SHERIFF'S DEPARTMENT. HE THEN RAN UP THE STAIRS, KNOCKED THE VICTIM TO THE GROUND AND ATTEMPTED TO DRAG HER INTO THE APARTMENT. THE VICTIM STRUGGLED WITH THE SUSPECT AND WAS ABLE TO BREAK LOOSE OF HIM. SHE RAN DOWN THE STAIRS AND OUT TO THE STREET. THE SUSPECT RAN INSIDE THE APARTMENT AND CAME BACK OUT HOLDING A BLACK, PUMP ACTION SHOTGUN. HE CAME DOWN THE STAIRS AND WALKED OVER TO THE VICTIM, AS SHE SAT IN HER CAR (LIC: 2VHR532) TRYING TO START IT, AND SHOT AT HER TWICE. THE BULLETS STRUCK THE RIGHT FRONT TIRE OF THE VICTIM'S VEHICLE. (SEE EV-2). THE SUSPECT THEN RAN WESTBOUND ON 97TH ST, SOUTHBOUND ON HALLDALE AVE, AND OUT OF VIEW. THE VICTIM FEARING FOR HER LIFE, DROVE TO MANCHESTER AV AND WESTERN AV WHERE SHE WAS ABLE TO FLAG DOWN LAPD UNIT 12A69.

THE VICTIM STATED THAT THE SUSPECT IS AN ACTIVE MEMBER OF THE "MONA PARK CRIPS", THE BROTHERS OF THE SUN" MOTORCYCLE CLUB, AND ASSOCIATES WITH "THE CHOSEN FEW" MOTORCYCLE CLUB.

A CHECK OF THE AREA FOR THE SUSPECT MET WITH NEGATIVE RESULTS.

---

11

**EXHIBIT B**

LR 105 LOS ANGELES COUNTY SHERIFF'S DEPARTMENT
CRIME ANALYSIS SUPPLEMENTAL FORM - SUSPECT/SUBJECT INFORMATION

URN 103-10148-0371-051

SV DEP GARCIA

EMPLOYEE # 428736

SUSPECT # 1 NAME BOWEN, JERRY

SUSPECT # NAME

SUBJECT

SUBJECT

CLOTHING DESCRIPTION

| ITEM TYPE | DESCRIPTION |
|---|---|
| SHIRT | PLAID |
| PANTS | BRO SWEAT TYPE WITH WHT STRIPES |

**ITEM TYPES**
**CAP/HAT**
**COAT/JACKET**
**DRESS/SKIRT**
**GLASSES**
**GLOVES**
**JEWELRY**
**PANTS**
**SHIRT/BLOUSE**
**SHOES**
**SHORTS**
**OTHER**

CLOTHING DESCRIPTION

| ITEM TYPE | DESCRIPTION |
|---|---|

| L | R | UNK | BODY PART | SCARS/MARKS/TATTOOS/ODDITIES |
|---|---|---|---|---|
| | X | | CHEST | TT OF AN "M" |
| X | | | CHEST | TT OF AN "P" |

| L | R | UNK | BODY PART | SCARS/MARKS/TATTOOS/ODDITIES |
|---|---|---|---|---|

X SUSPECTED GANG MEMBER NAME OF GANG MONA PARK CRIP

SUSPECTED GANG MEMBER NAME OF GANG

HAIR LENGTH
COLLAR
LONG
SHORT
SHOULDER

FACIAL HAIR
BEARD
CLEAN SHAVEN
FUZZ
GOATEE
LOWER LIP
MOUSTACHE

WEAPON
FIREARM
Style
MULTIPLE
BB PELLET
HANDGUN
RIFLE

KNIFE
Style
MULTIPLE
BUCK
BUTCHER/KITCHEN
DIRK/DAGGER/STILETTO
HUNTING/BOWIE

OTHER WEAPON
BODILY FORCE
LIGATURE
SLING SHOT
SYRINGE
TASER (STUN GUN)

HAIR TYPE
- BALD
- RECEDING
- X THICK
- THINNING
- WIG

HAIR STYLE
- AFRO/NATURAL
- BRAIDED/DREDLOCKS
- BUSHY
- BUTCH
- X COMBED BACK
- CURLERS
- CURLY
- FLAT TOP
- GREASY
- JHERI CURL
- MILITARY
- NETS
- PONY TAIL
- PROCESSED
- PERM
- SHAVED
- STRAIGHT
- WAVY

COMPLEXION
- ACNE/POCKED
- ALBINO
- X DARK
- FRECKLED
- LIGHT/FAIR
- MEDIUM
- PALE
- RUDDY
- SALLOW
- TANNED
- WEATHERED
- WRINKLED

- SIDE BURNS
- UNSHAVEN

TEETH
- BROKEN/CHIPPED
- BRACES
- DUCK
- GROOMED
- DECAYED
- FALSE
- GAP/SPACE
- GOLD CAP
- JEWELED
- MISSING
- NONE
- SILVER CAP
- STAINED

SPEECH
- ACCENT
- DISGUISE
- LISPS
- MUMBLES
- RAPID
- RASPY
- SLOW
- SLURRED
- STUTTER

HANDED
- LEFT
- RIGHT
- BOTH

- SAWED-OFF
- X SHOTGUN
- (ILLEGIBLE)
- ZIP GUN

Action:
- DERRINGER
- FULLY AUTO
- X PUMP
- REVOLVER
- SEMI AUTO
- SINGLE SHOT

Barrel Type:
- X SINGLE BARREL
- DOUBLE BARREL
- THREE BARREL
- 4 OR MORE BARREL

Color/Finish:
- BLUE STEEL
- CHROME/NICKEL
- X DULL BLACK
- RUSTED
- STAINLESS STEEL

Grip/Stocks
- ALTERED
- BONE/PEARL/IVORY
- COLLAPSES/FOLDABLE
- METAL/PLASTIC
- NO GRIP
- X RUBBER/VINYL
- TAPED
- (ILLEGIBLE)
- WOOD

- X GAUGE
- 12
- CALIBER

- SERRATED
- SWITCHBLADE
- TDT

Blade:
- FIXED
- FOLDING

CHEMICAL
- CAUSTIC
- INFECTIOUS
- MACE
- PEPPER SPRAY
- SIMULATED
- TEAR GAS
- TOXIC

BLUNT INSTRUMENT
- BASEBALL BAT
- BILLY CLUB
- BRASS KNUCKLES
- BRICK/ROCK/BOTTLE
- CLUB/BLUDGEON
- HAMMER/TOOL
- NUMCHUCKS
- TIRE IRON

CUT/STAB
- BAYONET/SWORD
- BOTTLE/GLASS
- ICE PICK
- MACHETE
- RAZOR
- SCREWDRIVER
- THROWING STARS

EXPLOSIVE/INCENDIARY
- FIREWORKS
- MOLOTOV COCKTAIL

RELATIONSHIP OF VICTIM TO SUSPECT:

| VS | VS | |
|---|---|---|
| VS | VS | ACQUAINTANCE |
| VS | VS | BABYSITTER |
| | | (PERSONS WATCHED/BABY) |
| VS 1 | VS | BOYFRIEND/GIRLFRIEND |
| VS | VS | CHILD |
| VS | VS | CHILD OF BOYFRIEND OR GIRLFRIEND |
| VS | VS | COMMON-LAW SPOUSE |
| VS | VS | EMPLOYEE |
| VS | VS | EMPLOYER |
| VS | VS | EX SPOUSE |
| VS | VS | FRIEND |
| VS | VS | GRANDCHILD |
| VS | VS | GRANDPARENT |
| VS | VS | HOMOSEXUAL RELATIONSHIP |
| VS | VS | IN-LAW |
| VS | VS | NEIGHBOR |
| VS | VS | OTHER FAMILY MEMBER |
| VS | VS | OTHERWISE KNOWN |
| VS | VS | PARENT |
| VS | VS | RELATIONSHIP UNKNOWN |
| VS | VS | SIBLING (BROTHER OR SISTER) |
| VS | VS | SPOUSE |
| VS | VS | STEPCHILD |
| VS | VS | STEPPARENT |
| VS | VS | STEPSIBLING (STEPBROTHER OR STEPSISTER) |
| VS | VS | VICTIM WAS OFFENDER |
| VS | VS | VICTIM WAS STRANGER |

R 106] LOS ANGELES COUNTY SHERIFF'S DEPARTMENT
RIME ANALYSIS SUPPLEMENTAL FORM – M. O. FACTORS 003-10148-0471-051

EA
- [ILLEGIBLE]
- BEACHES/OCEANS
- COMMERCIAL
- CONSTRUCTION SITE
- DESERT
- DRIVEWAY
- FREEWAY/HIGHWAY
- GOLF COURSE
- HARBOR
- INDUSTRIAL/WHOLESALE
- MOUNTAINS/FOOTHILLS
- PARK
- RESIDENTIAL
- RIVER
- RURAL/[ILLEGIBLE]
- SCHOOL GROUNDS
- SHOPPING CENTER
- SIDEWALK
- STREET/ALLEY
- TRANS RIGHT-OF-WAY/TRACKS
- VACANT LOT/OPEN FIELD
- WATER/LAKE

TRUCTURE: RESIDENTIAL
- APARTMENT
- CONDOMINIUM/TOWNHOUSE
- CONVALESCENT HOSPITAL
- DUPLEX
- MOBILE HOME
- SINGLE FAMILY
- VESSEL/BOAT

TRUCTURE: NON-RESIDENTIAL
- DEPOT/FINANCE
- BAR
- BUSINESS OFFICE
- CARGO CONTAINER
- CATERING TRUCK

TARGET: NON-RESIDENTIAL
- AUTOMATED TELFLER
- CASH REGISTER/DRAWER
- CLASSROOM/SUPPLIES
- COIN OP MACHINE
- DISPLAY ITEMS
- OFFICE
- SAFE BOX
- SNACK BAR
- STORAGE LOCKER
- VEHICLE
- VESSEL
- BICYCLIST
- CUSTOMER
- ELDER/SENIOR CITIZEN
- DISABLED PERSONS
- OWNER/EMPLOYEE
- PEDESTRIAN
- TRANSIENT
- VICTIM IN VEHICLE

POINT OF ENTRY/EXIT
- EX
- FRONT
- REAR
- SIDE
- GROUND LEVEL
- UPPER LEVEL
- ADJACENT BUILDING
- BASEMENT
- DOOR/SCREEN
- DUCT/VENT
- FENCE/GATE
- FIREPLACE
- FLOOR
- GARAGE
- GLASS DOOR
- HOUSE BEING FUMIGATED

METHOD OF ENTRY: TOOLS USED
- BODILY FORCE
- BOLT CUTTER
- BRICK/ROCK
- CHANNEL LOCK/PLIERS
- CUTTING INSTRUMENT
- ELECTRONIC DEVICE
- GLASS CUTTER
- KEY
- PRY TOOL
- SAW/BURN/DRILL
- SLIDE HAMMER
- SLIP DEVICE
- VEHICLE

SECURITY SYSTEM
- HOME
- AUTOMOBILE ALARM
- CAMERA
- CRIME WATCH
- DOG
- FENCE/BARS
- GUARD SERVICE
- OPERATION [ILLEGIBLE]
- OUTSIDE LIGHTING
- SECURITY SIGN/STICKER
- SILENT ALARM
- SPECIAL LOCKS/DEADBOLT
- WINDOW BARS

SUSPECT ACTIONS
- ATE/DRINK ON PREMISES
- CASED LOCATION
- COSTUME/DISGUISE WORN
- DEFECATED/URINATED
- DEMAND NOTE USED
- DEMANDED DRUGS/MONEY/ETC
- DISABLED PHONE
- DISABLED POWER

SUSPECT PRETENDED TO BE:
- BUSINESS PERSONS
- CONVERSATIONS [ILLEGIBLE]
- CUSTOMER
- DELIVERY PERSONS
- FAMILY MEMBER
- FIND MONEY
- HANDICAPPED
- LEAD ASSISTANCE
- NEED ASSISTANCE OR EMERGENCY
- NEED TOILET/PHONE/WATER
- OFFERED GOODS/SERVICES
- POLICE/SECURITY
- POSITION OF TRUST
- REPAIR PERSON
- SALES PERSON
- SEEK EMPLOYMENT
- SOUGHT DONATIONS
- UTILITY EMPLOYEE

VICTIM WAS:
- ASKED TO POSE/MODEL
- BLINDFOLDED
- BOUND/GAGGED
- BURIED
- CUT/STABBED
- DISTRACTED
- DRUGGED/SEDATED
- EXPLOITED
- FACE COVERED
- FOLLOWED
- FONDLED
- FORCED TO DISROBE
- FORCED TO FONDLE SUSPECT
- FORCED TO LIE ON FLOOR
- FORCED TO MASTURBATE
- FORCED TO MOVE
- FORCED TO ORALLY COPULATE SUSPECT
- GANG RELATED

ENTERTAINMENT/RECREATION
FAST FOOD
GAS STATIONS
HOSPITAL
HOTEL MOTEL
INDUSTRIAL/
MANUFACTURING/
WAREHOUSE
JAIL/PRISONS
JEWELRY/COST PAWNS
LIQUOR
MARKET
MINI MART
PARKING FACILITY
PARKING LOT/STRUCTURE
PASSENGER STATION/
PLATFORM (PAN)
PHARMACY/MEDICAL/
DENTAL
PUBLIC BUILDING
RELIGIOUS BUILDING
RESTAURANT
RETAIL GOODS
RETAIL SERVICE REPAIR
SCHOOL
STORAGE/RENTAL
TRAIN-FREIGHT
TRAIN-PASSENGER-LIGHT RAIL
TRAIN-PASSENGER-HEAVY RAIL
VEHICLE-COMMERCIAL
VESSEL/BOAT
VIDEO/MUSIC

---

"GE, RESIDENTIAL
ATTIC
BEDROOM
DINING ROOM
GARAGE/PARKING AREA
HALLWAY
KITCHEN
LAUNDRY ROOM
LOUVRE
MAIL SLOT
PET DOOR
ROOF SKYLIGHT
SLIDING GLASS DOOR
WALL
WINDOW/SCREENS

---

VEHICLE ENTRY/EXIT
/// EX
CAMPER SHELL/MOTORHOME
CONVERTIBLE
DOOR
DRIVER SIDE
HOOD
PASSENGER SIDE
SUNROOF
TRUCK BED
TRUNK
WINDOW
WINDOW (ILLEGIBLE)

---

METHOD OF ENTRY
ATTEMPT ONLY
BODILY FORCE
CUT
HID IN BUILDING
KNOCKED
KNOB TWIST
LET IN/RUSE
LOCK BOX
LOCK CUT/FROZEN
LOCK PUNCHED
LOCK SLIP/KEY PICK
NO FORCE
OPEN FOR BUSINESS
OPEN/UNLOCKED
PHONE
ARMED
REMOVED
SMASHED

DISABLED SECURITY SYSTEM
DISABLED VEHICLE
EXCESSIVE FORCE
FIRED WEAPON
FONDLED SELF
GRAFFITI
HID IN BUILDING
IGNITION PUNCHED
JUMPED THE COUNTER
KNEW LOCATION OF HIDDEN CASH
MASK WORN
MASTURBATED/EJACULATED
PHOTOGRAPHED/VIDEOTAPED
PILLOWCASE TAKEN/USED
POLICE SCANNER USED
RANSACKED
RECORDED/LOGGED EVENTS
RIPPED/CUT CLOTHING
SELECTIVE PROPERTY TAKEN
SUCKED
TAKEOVER
TOOK CONCEALABLES
USED MULTIPLE WEAPONS
VEHICLE USED TO REMOVE PROPERTY
VANDALIZED
VICTIMS NAME USED
VICTIMS TOOLS USED
WASHED CLOTHING/BEDDING
WIPED SCENE AFTER CRIME

---

SUSPECT WAS/HAD:
ALCOHOL ON BREATH
ANGRY
APOLOGETIC
BAD BREATH
BODY ODOR/UNUSUAL ODOR
GANG RELATED
INTIMIDATED/COERCED
NEVER SPOKE/QUIET
POLITE/KIND
PROFANITY
HANDCUFFED
(ILLEGIBLE)
LOCKED UP
MADE TO COUNT
PINCHED
PISTOL WHIPPED
SHOT
SLAPPED
THREATENED
TORTURED/MUTILATED

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BIAS-MOTIVATED INCIDENT:
RACIAL
ANTI-WHITE
ANTI-BLACK
ANTI-AMERICAN/INDIAN/ALASKAN NATIVE
ANTI-ASIAN/PACIFIC ISLANDER
ANTI-MULTIRACIAL GROUP
RELIGIOUS
ANTI-JEWISH
ANTI-CATHOLIC
ANTI-PROTESTANT
ANTI-ISLAMIC (MUSLIM)
ANTI-OTHER RELIGIONS
ANTI-MULTI RELIGIOUS GROUP
ANTI-ATHEIST/AGNOSTICISM
ETHNICITY/NATIONAL ORIGIN
ANTI-HISPANIC
ANTI-OTHER ETHNICITY/NATIONAL ORIGIN
SEXUAL
ANTI-MALE HOMOSEXUAL (GAY)
ANTI-FEMALE HOMOSEXUAL (LESBIAN)
ANTI-HOMOSEXUAL (GAY & LESBIANS)
ANTI-HETEROSEXUAL
ANTI-BISEXUAL
GENDER
ANTI-MALE
ANTI-FEMALE
ANTI-TRANSGENDER

LIVING/FAMILY ROOM
MAIL BOX
PATIO/PORCH
SAFE/BOX
STORAGE/SHED
STABLES/TACK ROOM
VEHICLE

---

TUNNELED
UNSECURED GATE

---

QUOTES UNUSUAL
RACE
TRUST VIOLATION
UNDER INFLUENCE

DISABILITY
ANTI-MENTAL DISABILITY
ANTI-PHYSICAL DISABILITY

[ER 107] COUNTY OF LOS ANGELES – SHERIFF'S DEPARTMENT SUPPLEMENTAL REPORT

DATE: 10-23-03

FILE: 403-10148-0371-051

C: ASSAULT WITH A DEADLY WEAPON (FIREARM) 245(A)(2) PC

ACTION: Active
Additional Information

V: KELLY, SHELLY
FB/08-06-65

D: 10-17-03

S: BOWEN, JOHN
MB/05-23-69

NARRATIVE

THE PURPOSE OF THIS SUPPLEMENTAL REPORT IS PROVIDE ACTIVE ADDITIONAL INFORMATION REGARDING THE COLLECTION OF PHOTOS (EV-1) DEPICTING THE SUSPECT.

WHILE AT THE SCENE, I ASKED THE VICTIM FOR A DESCRIPTION OF THE SUSPECT. SHE GAVE ME A VERBAL DESCRIPTION OF THE SUSPECT AND THEN WENT THROUGH HER HOUSE AND RETRIEVED 4 PHOTOS (EV-1). DEP. LOMBARDO BOOKED THE PHOTOS INTO EVIDENCE.

BY: H.Garcia 428735

APPROVED: Sgt Kepley #265007

ASSIGNED: LNX DB

SECRETARY: DD

## EXHIBIT E

SW NO. 9383

[ER 115] STATE OF CALIFORNIA – COUNTY OF LOS ANGELES

**SEARCH WARRANT AND AFFIDAVIT**

(AFFIDAVIT)

[Reviewed for
PC by DDA
/s/ Janet Wilson
11-4-03]

DETECTIVE CURT MESSERSCHMIDT, swears under oath that the facts expressed by him in this Search Warrant and Affidavit and the attached and incorporated Statement of probable cause, are true and that based thereon he has probable cause to believe and does believe that the property described below is lawfully seizable pursuant to Penal Code Section 1524, as indicated below, and is now located at the locations set forth below. Wherefore, affiant requests that this Search Warrant be issued.

Curt Messerschmidt
(Signature of Affiant)

NIGHT SEARCH REQUESTED:
YES [X] NO [ ]

**(SEARCH WARRANT)**

THE PEOPLE OF THE STATE OF CALIFORNIA TO ANY SHERIFF, POLICEMAN OR PEACE OFFICER IN THE COUNTY OF LOS ANGELES: proof by affidavit having been made before me by DETECTIVE CURT MESSERSCHMIDT, that there is probable cause to believe that the property described

herein may be found at the locations set forth herein and that it is lawfully seizable pursuant to Penal Code Section 1534 as indicated below by "X"(s) in that it:

____ was stolen or embezzled,
XX was used as the means of committing a felony,
XX is possessed by a person with the intent to use it as a means of committing a public offense or is possessed by another to whom he or she may have delivered it for the purpose of concealing or preventing its discovery,
XX tends to show that a felony has been committed or that a particular person has committed a felony,
____ tends to show that sexual exploitation of a child, in violation of P.C. Section 311.2, has occurred or is occurring

YOU ARE THEREFORE COMMANDED TO SEARCH: SEE ATTACHMENT 1

FOR THE FOLLOWING PROPERTY: SEE ATTACHMENT 2

AND TO SEIZE IT IF FOUND and bring it forth before me, or this court, at the courthouse of this court. This Search Warrant and incorporated Affidavit was sworn to and subscribed before me this 4th day of NOV., 2003 at 8:40 AM/~~PM~~

Wherefore, I find probable cause for the issuance of this Search Warrant and do issue it.

Eudon Ferrell, NIGHT SEARCH APPROVED:
(Signature of Magistrate) YES [X] NO [ ]
Judge of the Superior Court, Southwest, Judicial District.

[LOGO]

[ER 116] ATTACHMENT 1

LOCATION TO BE SEARCHED: 2234 E. 120th STREET, LOS ANGELES

(Location #1)

Described as a single story residence with white stucco and light blue trim. The residence has a gray composition roof and the numbers 2234 on the front curb. There are security bars on the front door and windows and the driveway is on the eastside of the property. There is a large front yard with large bushes and trees and a black wrought iron fence with brickwork along the front of the property. The front door of the residence faces north with a carport on the eastside of the residence. There is a second, smaller building, behind the main house under the same address.

RESIDENCE OF:
Jerry Ray Bowen MB/[DOB Omitted]

---

[ER 117] ATTACHMENT 1

The above described location, including any garages, rooms, attics, basements and other parts therein, the surrounding grounds, storage rooms, trash containers, and any out buildings of any kind located thereon. Any vehicles parked directly on the property or in the street in front of or nearby or adjacent to the above identified location, provided that prior to searching said vehicle or vehicles, the vehicles can be specifically connected to an occupant or permanent resident of the location to be searched. The search additionally to include, any person(s) therein who could upon their person, conceal weapons, or ammunition, all safes and locked containers.

[ER 118] ATTACHMENT 2

FOR THE FOLLOWING PROPERTY:

All handguns, rifles, or shotguns of any caliber, or any firearms capable of firing ammunition, or firearms or devices modified or designed to allow it to fire ammunition. All caliber of ammunition, miscellaneous gun parts, gun cleaning kits, holsters which could hold or have held any caliber handgun being sought. Any receipts or paperwork, showing the purchase, ownership, or possession of the handguns being sought. Any firearm for which there is no proof of ownership. Any firearm capable of firing or chambered to fire any caliber ammunition.

Articles of evidence showing street gang membership or affiliation with any Street Gang to include but not limited to any reference to "Mona Park Crips", including writings or graffiti depicting gang membership, activity or identity. Articles of personal property tending to establish the identify of person in control of the premise or premises. Any photographs or photograph albums depicting persons, vehicles, weapons or locations, which may appear relevant to gang membership, or which may depict the item being sought and or believed to be evidence in the case being investigated on this warrant, or which may depict evidence of criminal activity. Additionally to include any gang indicia that would establish the persons being sought in this warrant, affiliation or membership with the "Mona Park Crips" street gang.

[ER 119] SW NO. _____

FILE NO. 403-10148-0371-051

**STATE OF CALIFORNIA –**
**COUNTY OF LOS ANGELES**

**LOS ANGELES COUNTY**
**SHERIFF DEPARTMENT**

**SEARCH WARRANT AND AFFIDAVIT**

**(AFFIANT STATEMENT)**

Your Affiant is a Peace Officer employed for the past fourteen years by the Los Angeles County Sheriff's Department. Your Affiant is currently assigned to Safe Streets Bureau, Lennox Sheriff's Station, as a Gang Investigator. This is a specialized unit, investigating gang related crimes and arresting gang members for various violations of the law. Your Affiant has attended hundreds of hours of instruction on the dynamics of gangs and gang trends. Your Affiant is a member of a Los Angeles based gang investigators association, which shares current gang intelligence with county, municipal, and federal law enforcement agencies on a regular basis. Prior to your Affiant's above assignment, your Affiant was a Patrol Deputy, assigned to Lennox Sheriff's Station for six years. Your Affiant was involved in hundreds of gang related incidents, contacts, and or arrests during that time.

Your Affiant attended the Los Angeles Sheriff's Academy for approximately twenty weeks, at which time your Affiant received in excess of forty hours of training pertaining to gang related crimes, to include

but not limited to the investigation of gang related shootings. Your Affiant has received specialized training in the field of gang related crimes from his Field Training Officer during six months of Patrol Training and an additional 18 hours of training at Patrol School. Your Affiant has also received personalized instruction from Lennox Gang Detectives while working at Lennox Station.

[ER 120] Your Affiant worked for approximately four and a half years in a custody assignment, during which time your Affiant interviewed hundreds of individuals who were both sentenced and pre-sentenced on various gang related charges. During the course of these interviews, your Affiant obtained information pertaining to manners in which gang related assaults are committed, the motives for such assaults, and the concealment of weapon(s) used in such assaults. Your Affiant has also participated in the investigation and/or arrests of over 290 individuals related specifically to gang related crimes. During this time your Affiant spoke to law enforcement officers, experts in the field of gang related crimes, and suspects who have committed gang crimes. Your Affiant has assisted Los Angeles County Sheriff's Homicide Investigators on over thirteen (13) gang related murders, and your Affiant has testified as an arresting officer and as a, "gang expert", for the aforementioned crimes in the Los Angeles Superior Courts.

**[ER 121] FILE NO. 403-10148-0371-051**

**STATE OF CALIFORNIA –**
**COUNTY OF LOS ANGELES**

**LOS ANGELES COUNTY**
**SHERIFF DEPARTMENT**

**SEARCH WARRANT AND AFFIDAVIT**

**(STATEMENT OF PROBABLE CAUSE)**

Your Affiant, Deputy Curt Messerschmidt, has been investigating an assault with a deadly weapon incident which occurred on 10-17-03. This incident report is under sheriff's file # 403-10148-0371-051 (see exhibit #1).

On 10-17-03, a spousal assault and an assault with a deadly weapon occurred at 1425 W. 97th Street, Los Angeles. The victim, Shelly Kelly FB/38, lives at the above address and is the former girlfriend of the suspect (Jerry Ray Bowen) in this case.

The victim stated she has had an on going dating relationship with the suspect since April 2003. The victim said, due to the suspects violent temper and some previous physical assaults on her, by the suspect, the victim decided to break off the relationship and move out of the above location.

Because of the suspects violent nature, and the victim being fearful for her safety, the victim contacted Lennox Sheriff's Station and requested deputies to watch over her while she gathered some of her property from her residence. Upon the deputies arrival,

the victim began to retrieve her property and place it into her vehicle.

Approximately twenty (20) minutes after the deputies arrived, the deputies were assigned an emergent call of a child not breathing. The deputies advised the victim that they had to leave, but would return after handling of the call.

[ER 122] The victim stated as soon as the deputies left the location, the suspect appeared at the bottom of the stairs and stated, "I told you to never call the cops on me bitch!". The suspect advanced up the stairs and grabbed the front of the victim's shirt with both of his hands. The victim and suspect became involved in a physical altercation, with the suspect attempting to throw the victim over the top railing of the second story landing. The victim, who was able to keep herself f. m being thrown over the railing, was grabbed again by the suspect, who proceeded to bite the victim on the rear of the right shoulder. The suspect also grabbed the victim by the hair and attempted to drag her into the above location.

The victim, fearing for her personal safety, and to keep herself from being drug into the location, sat down on the ground, and straddled the doorway with her legs. The suspect then grabbed both of the victims arms, at which time, the victim was able to pull out of her shirt, and run to her vehicle. Within seconds, the suspect emerged from the location holding a black sawed off shotgun with a pistol grip and began running toward the victim.

The suspect ran to the front of the victims vehicle and pointed the shotgun at the victim stating, "If you try to leave, I'll kill you bitch!". The victim leaned over in her seat and pushed the gas pedal all the way down. The victim saw the suspect jumped out of the way of the vehicle and fire one round at her, blowing out the front left tire of the vehicle. The victim continued driving westbound 97th Street toward Halldale Avenue and could see the suspect chasing her on foot and firing the shotgun approximately four (4) more times in her direction. The victim was able to drive away and located police officers a short time later.

While deputies were interviewing the victim at her residence, they immediately recognized the victim and location, as the same individual and address they had left from earlier. The victim also provided four (4) photographs of the suspect to aid the deputies in their investigation. The deputies booked those pictures into evidence (see exhibit #2).

[ER 123] Based on the above information provided by the victim, Your Affiant placed a photo of Jerry Ray Bowen into a "six pack" line up prior to meeting with the victim. On 10-22-03, Your Affiant met and interviewed the victim, at Lennox Sheriff's Station. Prior to showing the photo line up, Your Affiant advised the victim of the, "Witness Admonition – Mug Show Ups" form. The victim stated she understood the admonition and signed the bottom of the form. Your Affiant showed the photo line up containing the photo of Jerry Ray Bowen to the victim. The victim immediately identified the bottom middle individual and

stated, "That's him right there!". Your Affiant had the victim circle the individual she identified and sign her name below the photograph (see exhibit #3). The person the victim identified is Jerry Ray Bowen MB/[Date Of Birth Omitted], a known Mona Park Crip gang member.

The victim also provided this investigator with a current address of the suspect residence (2234 E. 120th Street, Los Angeles). However, the victim also stated she has been told by her neighbors, that the suspect has been seen coming back to the 1425 W. 97th Street address.

Based on the fact that the suspect has been identified and is known personally by the victim as the person who physically assaulted and later shot at her, your Affiant request a Ramey Warrant be issued for Jerry Ray Bowen for his involvement in the above listed crimes.

Your Affiant conducted an extensive background search on the suspect by utilizing departmental records, state computer records, and other police agency records. Based on this extensive search and information provided by the victim, your Affiant has determined where the below listed person resides.

1) Jerry Ray Bowen MB/[Date Of Birth Omitted]

2234 E. 120th Street, Los Angeles

[ER 124] Your Affiant request that this Search Warrant be endorsed for night service due to the fact that the investigation has shown that the primary suspect

in this case has gang ties to the Mona Park Crip gang based on information provided by the victim and the cal-gang data base. Also your Affiant believes the nature of the crime (Assault with a deadly weapon) goes to show that night service would provide an added element of safety to the community as well as for the deputy personnel serving the warrant, based on the element of surprise.

Your Affiant also believes that the items sought will be in the possession of Jerry Ray Bowen and the recovery of the weapon could be invaluable in the successful prosecution of the suspect involved in this case, and the curtailment of further crimes being committed.

---

**[ER 125] STATE OF CALIFORNIA – COUNTY OF LOS ANGELES**

**PROBABLE CAUSE ARREST WARRANT AND AFFIDAVIT IN SUPPORT THEREOF**

**(AFFIDAVIT)**

Your Affiant, DET. CURT MESSERSCHMIDT is employed as a peace officer for the Los Angeles County Sheriff's Department and has attached hereto and incorporates by reference official reports and records of a law enforcement agency. These reports were prepared by law enforcement officers and contain factual information and statements obtained from victims, witnesses, and others which establish the commission of the following criminal offense(s): **Assault with a Deadly Weapon, 245(a)(2) P.C.** by the following person: **Jerry Ray Bowen**

Wherefore, your Affiant prays that a warrant of arrest be issued for said person.

/s/ Curt Messerschmidt
(signature of affiant)

**(ARREST WARRANT)***

THE PEOPLE OF THE STATE OF CALIFORNIA TO ANY PEACE OFFICER OF SAID STATE: proof by the accompanying and incorporated affidavit having been made before me by Det. Curt Messerschmidt, I find probable cause to believe that the therein described criminal offense(s) was (were) committed by the below named and described person. Wherefore, you are commanded forthwith to arrest said person

and bring said person before any magistrate in Los Angeles County, or in lieu thereof, you may release said person from custody prior to the time limitations of Penal Code Section 825 without bail or appearance before a magistrate. The arrestee may also be released on bail in the amount of $1,000,000

**This warrant may be executed at any time during the 30 calendar days following its issuance.**

**PERSON TO BE ARRESTED**

Name & aka's: Jerry Ray Bowen
Sex: MALE Race: BLACK DOB: [Date Of Birth Omitted] Ht: 5'10" Wt: 205 Hr: BLACK Eyes: BROWN
Residence Address: 2234 E. 120th St., Los Angeles
Business Address:
CII No. A08041346 FBI: 956827HA2
MAIN: 01324293

**The affidavit in support of this arrest warrant is incorporated herein and was sworn to and subscribed before me:**
**this 4th day of Nov. [Year warrant signed], at 8:40 A.M./P.M.**

**Wherefore, I find probable cause for the issuance of this arrest warrant and do issue it.**

Eudon Ferrell
(signature of Magistrate)

Eudon Ferrell
(typed or printed name)

Judge of the Inglewood Superior Court, Southwest, Judicial District

*Issued pursuant to People v. Ramey (1976) 16 C.3d 263; People v. Case (1980) 105 C.A.3d 826; and Payton v. New York (1980) 445 U.S. 573,63 L. Ed.2d 639.

[LOGO]

EXHIBIT F

[ER 127] PAGE 01 10/22/03 15:2[Illegible] LXIP PRINT REQUESTED BY CRIMINAL LXIO
TO: LXIO FROM: CLETS 10/22/03 15:19:49
1AWKGLXION.ID
DATE:10-22-03*TIME:15:19*

DMV RECORD FOR LAW ENFORCEMENT USE ONLY

DL/NO:A4089040*B/D:[DOB Omitted]*NAME:BOWEN JERRY RAY*
RES/ADDR: AS OF 09-03-03:1425 W 97TH ST LOS ANGELES 90047*
OTH/ADDR AS OF 03-27-03:2234 E 120TH ST LOS ANGELES *

IDENTIFYING INFORMATION:

SEX:MALE*HAIR:BROWN*EYES:BRN*HT:5-10*WT:205*

ID CARD MLD:08-25-97*EXPIRES:05-23-03*

LIC/ISS:05-18-01*EXPIRES:05-23-04*CLASS:C NON-COMMERCIAL*
ENDORSEMENTS:NONE*
ORIGINAL DL ISSUE DATE:06-18-01*

LATEST APP:

DL TYPE:RENEWAL*ISS/DATE: 09-03-03*OFFICE: COM*BATES:POL*

PEND/APP:PENDING AUTOMATED APP *

LICENSE STATUS:
VALID*

DEPARTMENTAL ACTIONS:

DRV LIC SUSPENDED *EFF:08-03-01*ORDER MAILED:07-30-01*AUTH:13801 *
REASON:LACK OF KNOWLEDGE OR SKILL*SERVICE:A/07-30-01*CERTIFIED MAIL*
ACTION ENDED:02-14-02*

DRV LIC SUSPENDED *EFF:02-14-02*ORDER MAILED:02-14-02*AUTH:13953 *
REASON:DISABILITY*SERVICE:D/02-14-02*PERSONAL SERVICE BY DMV*
ACTION ENDED:07-15-02*

CONVICTIONS:

| VIOL/DT | CONV/DT | SEC/VIOL | DKT/NO | DISP | COURT | VEH/LIC |
|---|---|---|---|---|---|---|
| 04-02-01 | 07-12-01 | 12500A VC<br>16028A VC | 105815<br>*COURT PROB 24 | CGW<br>MO | 19463 | 2KVG282 |
| DMV POINT | COUNT 0 | | | | | |
| 01-09-02 | 05-17-02 | 21453A VC | WX50449 | C | 19420 | 3BVB575 |
| DMV POINT | COUNT 1 | | | | | |
| 06-15-02 | 08-05-02 | 12500A VC | 214238 | CGW | 19405 | RAY 12 |
| [ER 128] | | | *COURT PROB 12 | MO | | |
| DMV POINT | COUNT 0 | | | | | |
| 11-25-02 | 04-30-03 | 4000A1 VC<br>40508A VC<br>5200 VC | 6495197<br>*FTA CLEARED | C | 19463 | V209348 |
| DMV POINT | COUNT 0 | | | | | |
| 03-02-03 | 07-16-03 | 22108 VC | 5831017 | C | 19463 | 3BUB575 |
| DMV POINT | COUNT 1 | | | | | |
| 03-27-03 | 07-28-03 | 27315D VC | 73870RU | B | 19435 | 4TEB259 |
| DMV POINT | COUNT 0 | | | | | |

FAILURES TO APPEAR:
NONE

ACCIDENTS:

| DATE/TIME | LOCATION | VEH LIC | REPORT NO | FR CASE NO |
|---|---|---|---|---|
| 04-02-01 23 | LOS ANGELES 060801 | 2KVG282 | 19424530358 | |
| | PARTY FOUND MOST AT FAULT | | | |

END

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## EXHIBIT G

[ER 130] Printed by: Messerschmidt, Curt Alan (283271), LASD-LNX
Date: 11/03/2003

| Gang Member Subject File Report |
| --- |
| *Subject Id: CA01-0000056886* |

Never to be used as probable cause for arrest.

*Subject Information*

| | | | |
| --- | --- | --- | --- |
| Name: | Bowen, Jerry Ray | Moniker: | C Jay |
| Alias: | J, Bowman<br>Ray, Bowmen Jerry | Membership Status: | Active |
| Subject Type: | Member | Race Appearance: | |
| Gender: | Male | Nationality: | |
| Race: | Black | Birth Place: | |
| Descent: | | Birth State: | |
| Birth Date: | [Date Of Birth Omitted] | School Attendance: | |
| Deceased Date: | | | |
| School Name: | | | |
| Employer Name: | | | |
| Comments: | | | |
| History: | | | |

*Gang Information*

| Gang Name | Relationship | Clique |
| --- | --- | --- |
| Mona Park Crips | Primary | |
| Dodge City Crips | Secondary | |

*Membership Criteria*

| Date | Facility | Officer Name | Officer ID | Officer Phone Number | Membership Criteria |
|---|---|---|---|---|---|
| 05/17/2003 | LASD – CEN (Century) | Jurado, G | 412075 | (323) 567-8121 | • Arrested alone or with gang<br>• Self admitted<br>• Affiliates gang |
| 05/17/2003 | LASD – CEN (Century) | Murphy, M | 441381 | (323) 567-8121 | • Self admitted<br>• Affiliates gang<br>• Arrested alone or with gang |
| [ER 131] | | | | | |
| 07/01/1993 | Los Angeles Pd | Unk Lapd | | | • Reasonable suspicion |

*Physical Description*

| Date | Ht. | Wt. | Eye Color | Hair Color | Hair Type | Hair Length | Face Hair | Complexion | Teeth | Build |
|---|---|---|---|---|---|---|---|---|---|---|
| 05/17/2003 | 510 | 205 | Brown | Black | | | | | | |
| 07/01/1993 | 601 | 200 | Brown | Black | | | | | | |

*General Description Comments*

Comments:

*Scars, Marks, Tattoos, Oddities*

| Type | Location | Side Part | Description |
|---|---|---|---|
| Tattoo/Word | Upper | Left Arm | CJ |
| Tattoo/Word | | Chest | Mona Park Crip |
| Tattoo/Word | | Left Shoulder | MP |

Type: Tattoo/Word
Location:
Side: Left
Part: Arm
Description: MPCC 121

*Images/Photographs*

Date: 05/16/2003 [Photograph Omitted]
Photographer Facility: LASD – CEN (Century)
Photographer Name: Jailer
Photographer ID: 000000
Method Obtained: Booking
Description: 7696436

Date: 04/28/1998
Photographer Facility: LASD – CEN (Century)
Photographer Name: Deputy Todd Anderson
Photographer ID: 248081
Method Obtained: Booking
[132] Description: [Photograph Omitted]

*Affiliate Information*

| Information Date | Affiliate Name | DOB | Type | Gang |
|---|---|---|---|---|
| • 05/17/2003 | Hall, Terrell Jerome | [Date Of Birth Omitted] | Member | Mona Park Crips |
| • 05/17/2003 | Lang, Danny Akeem | [Date Of Birth Omitted] | Affiliate | Mona Park Crips |
| • 05/17/2003 | Smith, Jonathan Christopher | [Date Of Birth Omitted] | Affiliate | Mona Park Crips |

*Identification Information*

| Identification Type | Identification Number |
|---|---|
| GangNet Number | CA01-0000056886 |
| Driver License | CA A4089040 |
| Driver License | X7876187 |
| FBI Number | 9568274A2 |
| Great Number | 184971 |
| Juvenile Number | 00644759 |
| Police Number | 2118909B |
| Sheriffs Number | 01324923 |
| Social Security | [Social Security Number Omitted] |
| State Identification(CII) | A08041346 |

*Field Interview Information*

| Date/Time | Facility | Officer Name | Officer ID | Reference Number |
|---|---|---|---|---|
| • 08/05/2001 00:00 | Lapd Wilshire | Sloan | 31080 | |

Notes: Susp was arrested for 273.5PC by LAPD Wilshire patrol ofcrs as of 08-02-01. Bkg #6966544.

[ER 133] Location: 4861 Venice (Wilshire Sta – L.A.P.D.) Boulevard Los Angeles CA

| | | | |
|---|---|---|---|
| • 02/19/1994 00:00 | LASD – Lynwood(old) | | 273538 |

Notes: Arrested at 11200 block of zamora ave. By deputy sheldon/alvarado

Location:

---

*Alert Information*

| | |
|---|---|
| Alert | – InformationDateTime, Alert, ExpirationDate, Facility, OfficerName, OfficerId |

*Arrest information*

| | |
|---|---|
| Arrest | – Charge, Date, Facility, Unit, Booking Number, Convicted, Comments |
| Case | – Date, Number, Disposition |
| Housing | – Release Date, Facility, Unit, Module, Cell |

• Arrest

*PC 245(A)(2)-F Adw – W/Firearm*
10/17/2003, LASD-LNX, , NOT BOOKED, ,

Case , 403-10148-0371-051,

Housing , , , ,

- Arrest

  *PC 12031(A)(2)(C)-F Carry Firearm*
  05/16/2003, LASD-CEN (Century), I/O Ellison, #7696436, ,

  Arrested with Danny Lang (new Mona Park Affil), Terrell Hall (Mona Park) and Johnathan Smith (new-Mona Park Affiliate)

Case , 03-08815-21,

Housing , , , ,

- Arrest

  *PC 12021-F Weapons Violation*
  02/19/1994, LASD-Lynwood(old), , 3868983, ,

Case , 94-03894-21,

Housing , , , ,

- Arrest

  *PC 12025(A)-F Concealed Weapon*
  02/19/1994, LASD-Lynwood(old), , 3868983, ,

Case , 94-93894-21,

Housing , , , ,

- Arrest

  [ER 134] *PC 12031(A)-M Loaded Firearm*
  02/19/1994, LASD-Lynwood(old), , 3868983, ,

Case , 94-03894-21,

Housing , , , ,

*Special Enforcements*

| Type | Date/Time | Facility | Officer Name | Officer ID | Comments |
|---|---|---|---|---|---|

*Probation Record*

Probation terms are subject to verification with the probation department.

**Probation Number:**
**File Received Date:** **Received From:**
**Fine-Restitution Indicator:** **Case Status:**
**Case Load Number:** **Number Of Convictions:**
**Probation Officer:** **Officer Phone:**
**Departure Date:** **Departure Code:**
**File Sent Date:** **Sent To:**
**Most Serious Crime:**

*Court Appearances*

**Court – Case Num, Date, Location, Status, Expiration**
**(May or may not terminate on this date.)**

*Vehicle Information*

| Information Date | Year | Make | Model | Style | Color | License | VIN Number | Relationship |
|---|---|---|---|---|---|---|---|---|
| • 02/19/1994 | 0 | Chevrolet | | 2 Door | Gray | IDTW385 | | |
| • 02/14/1989 | 1965 | Chevrolet | Impala | 2 Door | Blue | NQM296 | | |

*Location Information*

| Information Date | Address | Resides Relationship |
|---|---|---|
| • 05/17/2003 | 2234 E 120 Street Los Angeles CA 90059 | |
| As told to Cen Deps. | | |
| • 05/17/2003 | 2128 E 120 Street Compton | Arrested |
| [ER 135] See Arrest, same date. | | |
| • 08/05/2001 | 4861 Venice (Wilshire Sta – L.A.P.D.) Boulevard Los Angeles CA | |
| • 08/05/2001 | 2303 S Marvin Avenue L.A. CA 90019 | Resides |
| • 04/28/1998 | 350 3Rd Street San Pedro CA | Resides |
| • 02/19/1994 | 1108 Culver Avenue E Compton CA 90221 | Resides |
| • 07/01/1993 | 350 W 3rd Street 16 San Pedro CA | Resides |
| • 07/01/1993 | 1st Street MESA San Pedro | Frequents |
| 2nd St Mob | | |

*Contact Information*

| Date | Type | Phone Number | Computer Contact | Comments |
|---|---|---|---|---|

**EXHIBIT H**

[ER 137]

PAGE 01 10/20/03 07:53 LXIP PRINT REQUESTED BY CRIMINAL LXIO
TO: LXIO FROM: CCHRS [ILLEGIBLE] 10/20/03 07:48:06
[ILLEGIBLE] 99
LOS ANGELES COUNTY
CONSOLIDATED CRIMINAL HISTORY REPORTING SYSTEM Date: 10/20/2003 Time: 0748

CRIMINAL HISTORY TRANSCRIPT FOR OFFICIAL USE ONLY
UNAUTHORIZED USE IS A CRIMINAL OFFENSE

INFORMATION FINGERPRINT VERIFIED UNLESS OTHERWISE NOTED BY AN ASTERISK ( * )

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Key Name: (3) BOWEN,JERRY RAY Date Name First Used: 03/17/1997

SID/CII: A08041346 MAIN: 01324293 FBI: 956827HA2 LAPD: 2118909B

Requested By: SH 283271 Src-TTY: LXIO Dest-TTY: LXIO ACHS Data Included: YES
Agency: CA0190040 LASD – COURT SERVICES – WEST BUREAU
Reason: 0310148 Multi-State Record: NO

DEPT. OF JUSTICE AND DMV MAY HAVE ADDITIONAL INFORMATION

SUMMARY

| Bookings | | Convictions | | Juvenile | | Warrants Issued | | Probation | |
|---|---|---|---|---|---|---|---|---|---|
| Felony: | 17 | Felony: | 4 | Sustained: | 0 | Bench: | 4 | Open: | 2 |
| * | 1 | | | | | | | | |
| Misd: | 7 | Misd: | 11 | Dismissed: | 4 | Arrest: | 2 | Expired: | 8 |
| | | * | 1 | | | | | * | 1 |
| | | | | | | Infract.(FTA): | 0 | | |

LATEST INFORMATION

Latest Name: (3) BOWEN,JERRY RAY Date Name Last Used: 06/20/1997

| Sex | Race | Hair | Eyes | Hgt | Wgt | DOB | Updated |
|---|---|---|---|---|---|---|---|
| M | BLACK | BLACK | BROWN | 510 | 212 | [Date Of Birth Omitted] | 05/17/2003 |

Latest Address: 2234 E 120TH ST LA CA 90059 05/17/2003
Latest Occupation:

| Type | Start Date | End Date | Charge/Description | Case Number | Updated |
|---|---|---|---|---|---|
| PROBATION SUMM | 05/14/2002 | 05/13/2004 | 12500 (A) | LAM1MT0581501 | 10/03/200 [ILLEGIBLE] |
| PROBATION SUMM | 11/06/2001 | 09/04/2004 | 273.5 (A) | LACBA22065201 | 10/03/200 [ILLEGIBLE] |

[ER 138] PAGE 02

| Registration | Reg Number | Location | Reg Date |
|---|---|---|---|
| DNA SAMPLE RECEIVED | A08041346DNB | | 01/01/0001 |

DESCRIPTIONS

| | #/Names/AKAs/Count | | |
|---|---|---|---|
| (1) BOWEN, BOWDEN | 1 | (2) BOWEN, JERRY | 9 |
| (3) BOWEN, JERRY RAY | 32 | (4) BOWEN, TERRY JR | 2 |
| (5) BOWEN, JERRY RAY JR. | 1 | (6) BOWMEN, JERRY RAY | 8 |
| (7) JERRY, LITTLE | 1 | (8) LITTLE, JERRY | 1 |
| (9) BOWEN, JERRY * | 1 | (10) JENKINS, ALLEN KELLY | 1 |

| | | | |
|---|---|---|---|
| (11 BOWEN, JERRY RAY | * 1 | (12) BOWDEN, JERRY RAY | 1 |
| (13) BOWEN, TERRY | 2 | (14) BOWEN, JERRY RAY II | 1 |
| (15) BOWMEN, TERRY RAY | 1 | (16) MONIKER, CJ | 1 |

Dates of Birth/Count

[Dates Of Birth Omitted] 1 [Date Of Birth Omitted] * 2

Scars/Marks/Tatoos

| | | | | |
|---|---|---|---|---|
| *TAT CHEST | *TAT L ARM | *TAT R ARM | *TAT BACK | TAT L ARM |
| TAT L ARM | TAT ARM | TAT CHEST | SC L ELB | TAT L ARM |
| TAT L ARM | TAT CHEST | TAT L CALF | TAT UR ARM | TAT CHEST |

Other Identifiers

| | | | | | |
|---|---|---|---|---|---|
| SSN | *[Social Security Number Omitted] | DL | C5246125 | CA | LAPD *2118909B |
| SSN | [Social Security Number Omitted] | DL | A4089040 | CA | LAPD 2118909B |
| SSN | [Social Security Number Omitted] | DL | A4089046 | CA | |
| SSN | [Social Security Number Omitted] | DL | *A4089040 | CA | |
| SSN | [Social Security Number Omitted] | | | | |
| FBI | 956827HA2 | CDC | E028553 | | |

Addresses/Count

| | |
|---|---|
| 2244 E 113TH ST LA CA | 1 |
| 1138 S PACIFIC AVE #219 SAN PEDRO CA | 1 |
| 1138 S PACIFIC #119 SAN PEDRO CA | 1 |
| 240 W 3RD ST #16 SAN PEDRO CA | 1 |

Addresses/Count

| | |
|---|---|
| [ER 139] PAGE 03 | |
| [Illegible] 0271 15TH STREET SAN PEDRO CA | 1 |
| [Illegible] 41 S MESA STREET SAN PEDRO CA | 1 |
| [Illegible] 234 120TH ST COMPTON CA 90222 | 1 |
| [Illegible] 00 S MESA STREET SAN PEDRO CA | 1 |
| [Illegible] 50 W 3RD ST #16 SAN PEDRO CA 90731 | 1 |
| [Illegible] 71 W 15TH STREET SAN PEDRO CA | 1 |
| [Illegible] 108 CULVER AVENUE #E COMPTON CA 90221 | 1 |
| [Illegible] 50 3RDSTT SAN PEDRO CA 00000 | 1 |
| [Illegible] 50 3RD ST SAN PEDRO CA 00000 | 1 |
| [Illegible] 742 W 146TH ST #E GARDENA CA | * 1 |
| TRANSIENT SAN PEDRO CA | 1 |
| [Illegible] 50 3RD ST SAN PEDRO CA | 1 |

Addresses/Count

| | |
|---|---|
| 271 15HT [sic] STREET SAN PEDRO CA | 1 |
| 1446 E LIVE OAK AVE ARCADIA CA 91006 | 1 |
| 2234 E 120TH ST LOS ANGELES CA | 1 |
| 2234 E 120TH ST LOS ANGELES CA | 1 |
| CALIF MENS COLONY SN LUIS OBISP CA | 1 |
| 2234 E 120TH ST COMPTON CA | 1 |
| 2303 S MARVIN AVE #01 LOS ANGELES CA | 1 |
| 2303 S MARVIN AVE LOS ANGELES CA 90016 | 1 |

| | | |
|---|---|---|
| 2303 S MARVIN LOS ANGELES CA | | 1 |
| 2303 S MARVIN LOS ANGELES CA | | 1 |
| 2303 S MARVIN AV LOS ANGELES CA | | 1 |
| 2303 S MARVIN ST LOS ANGELES CA 90016 | * | 1 |

Addresses/Count

| | |
|---|---|
| 1108 CULVER ST #E COMPTON CA | 1 |
| 2234 E 120TH ST LA CA 90059 | 1 |

Birth Places/Count

| | |
|---|---|
| CA | * 2 |

Monikers/Count

| | | | | |
|---|---|---|---|---|
| CEEJAY | | 1 | CJAY | 1 |
| FRUITCAKE | | 1 | JAY | 1 |
| LITTLEJERRY | | 1 | JBIRD | 1 |
| CJ | * | 1 | CJ | 1 |

[ER 140] Gang Memberships/Count

| | |
|---|---|
| PRIMERA FLATS E/S | 2 |

JUVENILE SUSTAINED PETITIONS

No Juvenile Information.

CONVICTIONS/ACTIVE DIVERSIONS

| Arr Date | Name | Arresting Agency | Booking Number |
|---|---|---|---|
| * | | | |

| Sex | Race | Hair | Eyes | Hgt | Wgt | DOB |
|---|---|---|---|---|---|---|
| M | | BLACK | BROWN | 510 | 175 | [Date of Birth Omitted] |

| File Date | Name | Case Number/County | Last Dept/Div | Warrants Issued |
|---|---|---|---|---|
| *07/31/2002 | 11 | LAX2WL1423801/LOS ANGE | COL | NONE |

| Cnt | Filed Charges | Dispo Date | Dispo | Sentence/Probation Type |
|---|---|---|---|---|
| 01 | VC 14601.1(A) SUSPENDED LICENSE | 08/05/2002 | Dismissal in furth of justice per 1385 PC | |
| 02 | VC 12500(A) UNLICENSED DRIVER | 08/05/2002 | Convicted | SUMM PROB 12 MONTH(S) AND FINE $150.00 OR 5 DAY(S) LA COUNTY JAIL |

| Arr Date | Name | Arresting Agency | Booking Number |
|---|---|---|---|
| 08/02/2001 | 3 | LAPD – WILSHIRE DIVISION | 006966544 |

| Sex | Race | Hair | Eyes | Hgt | Wgt | DOB |
|---|---|---|---|---|---|---|
| M | BLACK | BLACK | BROWN | 510 | 205 | [Date of Birth Omitted] |

| Cnt | Arrest Charges | Dispo Date | Result |
|---|---|---|---|
| 1 | PC 273.5(A) ASSAULT | | Time Served WARRANT #LACBA22065201 |
| 2 | PC 3056 PAROLE VIOLATION – FELONY | | UNKNOWN |

| File Date | Name | Case Number/County | Last Dept/Div | Warrants Issued |
|---|---|---|---|---|
| 08/06/2001 | 3 | LACBA22065201/LOS ANGE | CKC | 1 |

| [ER 141] Cnt | Filed Charges | Dispo Date | Dispo | Sentence/Probation Type |
|---|---|---|---|---|
| 01 | PC 273.5(A)<br>ASSAULT | 09/05/2001 | Convicted | SUMM PROB 36 MONTH(S) AND 51 DAY(S) LA COUNTY JAIL |

| Cnt | Filed Charges | Dispo Date | Dispo | Sentence/Probation Type |
|---|---|---|---|---|
| | | 11/06/2001 | Convicted | SUMM PROB 36 MONTH(S) AND 51 DAY(S) LA COUNTY JAIL |
| 02 | PC 211<br>ROBBERY | 08/30/2001 | Court found insufficient cause | |
| 03 | PC 273.5(A)<br>ASSAULT | 09/05/2001 | Dismissal in furth of justice per 1385 PC | |

| Arr Date | Name | Arresting Agency | Booking Number |
|---|---|---|---|
| 04/02/2001 | 3 | LAPD – WILSHIRE DIVISION | 006829337 |

| Sex | Race | Hair | Eyes | Hgt | Wgt | DOB |
|---|---|---|---|---|---|---|
| M | BLACK | BLACK | BROWN | 602 | 105 | [Date of Birth] Omitted] |

| Cnt | Arrest Charges | Dispo Date | Result |
|---|---|---|---|
| 1 | 2800.2(A) VC | | UNKNOWN |

| File Date | Name | Case Number/County | Last Dept/Div | Warrants Issued |
|---|---|---|---|---|
| 06/08/2001 | 3 | LAMIMT0581501/LOS ANGE | C60 | 1 |

| Cnt | Filed Charges | Dispo Date | Dispo | Sentence/Probation Type |
|---|---|---|---|---|
| 01 | VC 14601.1(A)<br>SUSPENDED LICENSE | 07/12/2001 | Dismissal in furth of justice per 1385 PC | |

| Cnt | Filed Charges | Dispo Date | Dispo | Sentence/Probation Type |
|---|---|---|---|---|
| 03 | VC 12500(A)<br>UNLICENSED DRIVER | 07/12/2001 | Convicted | SUMM PROB 24 MONTH(S) AND FINE $240.00 OR 8 DAY(S) LA COUNTY JAIL |
| | | 05/14/2002 | Convicted | SUMM PROB 24 MONTH(S) AND FINE $240.00 OR 8 DAY(S) LA COUNTY JAIL |

| Arr Date | Name | Arresting Agency | Booking Number |
|---|---|---|---|
| [ER 142] 08/04/1995 | 3 | PERRIS POLICE DEPARTMENT | 9503809 |

| Sex | Race | Hair | Eyes | Hgt | Wgt | DOB |
|---|---|---|---|---|---|---|

| Cnt | Arrest Charges | Dispo Date | Result |
|---|---|---|---|
| 1 | PC 12021(A)<br>POSS FIREARM BY FELON/ETC | UNKNOWN | UNKNOWN |
| 2 | PC 12035(B)(1)<br>WEAPONS VIOLATION | UNKNOWN | UNKNOWN |
| 3 | PC 12091<br>WEAPONS VIOLATION | UNKNOWN | UNKNOWN |

| | | | | |
|---|---|---|---|---|
| 4 | HS 11378<br>CONT SUBS – POSS FOR SALE | | UNKNOWN | UNKNOWN |
| 5 | PC 148.9<br>FALSE ID TO PEACE OFFICER | | UNKNOWN | UNKNOWN |

| File Date | Name | Case Number/County | Last Dept/Div | Warrants Issued |
|---|---|---|---|---|
| | 3 | P95F-6413/RIVERSIDE | | NONE |

| Cnt | Filed Charges | Dispo Date | Dispo | Sentence/Probation Type |
|---|---|---|---|---|
| 01 | SEE COMMENT FOR CHAR | 08/22/1995 | Convicted | |
| 02 | SEE COMMENT FOR CHAR | 08/22/1995 | Dismissed | |
| 03 | SEE COMMENT FOR CHAR | 08/22/1995 | Dismissed | |
| 04 | SEE COMMENT FOR CHAR | 08/22/1995 | Convicted | |
| 05 | PC 12090<br>WEAPONS VIOLATION | 08/22/1995 | Dismissed | |
| 06 | SEE COMMENT FOR CHAR | 08/22/1995 | Dismissed | |

| Arr. Date | Name | Arresting Agency | | | | Booking Number | |
|---|---|---|---|---|---|---|---|
| 02/19/1994 | 3 | LASD – CENTURY STATION PATROL | | | | 003868983 | |
| | Sex | Race | Hair | Eyes | Hgt | Wgt | DOB |
| | M | BLACK | BLACK | BROWN | 510 | 165 | [Date of Birth Omitted] |

| Cnt | Arrest Charges | Dispo Date | Result |
|---|---|---|---|
| [ER 143] | PC 12021(A) | | Both Abstract and Probation Rpt |
| 1 | POSS FIREARM BY FELON/ETC | | WARRANT #SCTA029002 |
| 2 | PC 3056<br>PAROLE VIOLATION – FELONY | | UNKNOWN |

| File Date | Name | Case Number/County | Last Dept/Div | Warrants Issued |
|---|---|---|---|---|
| 02/23/1994 | 3 | SC TA02900201/LOS ANGE | | NONE |

| Cnt | Filed Charges | Dispo Date | Dispo | Sentence/Probation Type |
|---|---|---|---|---|
| 01 | PC 12021(A)<br>POSS FIREARM BY FELON/ETC | 02/24/1994 | Certified Plea to Superior Court | |

| Arr Date | Name | Arresting Agency | | | | Booking Number | |
|---|---|---|---|---|---|---|---|
| 04/27/1989 | 3 | LAPD – HARBOR AREA | | | | 001376985 | |
| | Sex | Race | Hair | Eyes | Hgt | Wgt | DOB |

| Cnt | Arrest Charges | Dispo Date | Results |
|---|---|---|---|
| 1 | PC 245(A) (2)<br>ADW – W/FIREARM | | |

| File Date | Name | Case Number/County | Last Dept/Div | Warrants Issued |
|---|---|---|---|---|
| 05/01/1989 | 3 | SO A043395 01/LOS ANGE | | NONE |

| Cnt | Filed Charges | Dispo Date | Dispo | Sentence/Probation Type |
|---|---|---|---|---|
| 01 | PC 245(A)<br>ADW | 08/02/1989 | Conviction | 2 YEAR(S) STATE FACILITY |

| Arr Date | Name | Arresting Agency | Booking Number |
|---|---|---|---|
| 05/15/1988 | 3 | LAPD – COMMUNICATIONS CENTER | 2118909B96 |

| Sex | Race | Hair | Eyes | Hgt | Wgt | DOB |
|---|---|---|---|---|---|---|

| Cnt | Arrest Charges | Dispo Date | Results |
|---|---|---|---|
| 1 | PC 602(N)<br>TRESPASSING | UNKNOWN | UNKNOWN |

| File Date | Name | Case Number/County | Last Dept/Div | Warrants Issued |
|---|---|---|---|---|
| 05/16/1988 | | LAP88S0204501/LOS ANGE | | NONE |

| Cnt | Filed Charges | Dispo Date | Dispo | Sentence/Probation Type |
|---|---|---|---|---|
| 01 | PC 602(N)<br>TRESPASSING | 05/16/1988 | Convicted | PLED NOLO/30DS JAIL |

| Arr Date | Name | Arresting Agency | Booking Number |
|---|---|---|---|
| 05/15/1988 | | LAPD – HARBOR AREA | 009641084 |

| Sex | Race | Hair | Eyes | Hgt | Wgt | DOB |
|---|---|---|---|---|---|---|

| [ER 146] Cnt | Arrest Charges | Dispo Date | Result |
|---|---|---|---|
| 1 | PC 602(N)<br>TRESPASSING | | |

| File Date | Name | Case Number/County | Last Dept/Div | Warrants Issued |
|---|---|---|---|---|
| 05/19/1988 | 1 | ELM88M0387301/LOS ANGE | | 1 |

| Cnt | Filed Charges | Dispo Date | Dispo | Sentence/Probation Type |
|---|---|---|---|---|
| 01 | VC 23152(A)<br>DUI – ALCOHOL/DRUGS | 05/03/1989 | Dismissal in furth of justice per 1385 PC | |
| 02 | VC 23152(B)<br>DUI – ALCOHOL | 05/03/1989 | Plead Guilty | SUMM PROB 3 YEAR(S) |

| Arr Date | Name | Arresting Agency | Booking Number |
|---|---|---|---|
| 04/12/1988 | 3 | LAPD – HARBOR AREA | 009591117 |

| Sex | Race | Hair | Eyes | Hgt | Wgt | DOB |
|---|---|---|---|---|---|---|

| Cnt | Arrest Charges | Dispo Date | Result |
|---|---|---|---|
| 1 | HS 11359<br>POSS MARIJUANA FOR SALE | | |

| File Date | Name | Case Number/County | Last Dept/Div | Warrants Issued |
|---|---|---|---|---|
| 04/13/1988 | 3 | LAP88S0158401/LOS ANGE | | NONE |

| Cnt | Filed Charges | Dispo Date | Dispo | Sentence/Probation Type |
|---|---|---|---|---|
| 01 | VC 12500(A)<br>UNLICENSED DRIVER | 04/13/1988 | Convicted | PG/FINE $150/5DAS |

| Arr Date | Name | Arresting Agency | Booking Number |
|---|---|---|---|
| 02/17/1988 | 6 | LAPD – HARBOR AREA | 009504116 |

| Sex | Race | Hair | Eyes | Hgt | Wgt | DOB |
|---|---|---|---|---|---|---|

| [ER 147] Cnt | Arrest Charges | Dispo Date | Result |
|---|---|---|---|
| 1 | PC 148<br>RESISTING | | |

| File Date | Name | Case Number/County | Last Dept/Div | Warrants Issued |
|---|---|---|---|---|
| 02/18/1988 | 6 | LAP88S0068801/LOS ANGE | | NONE |

| Cnt | Filed Charges | Dispo Date | Dispo | Sentence/Probation Type |
|---|---|---|---|---|
| 01 | PC 602(N) | 02/19/1988 | Convicted | |
| | TRESPASSING | | | $300.00 FINE OR 10DAYS JAIL |

| Arr Date | Name | Arresting Agency | Booking Number |
|---|---|---|---|
| 02/12/1988 | 6 | LAPD – HARBOR AREA | 009498022 |

| Sex | Race | Hair | Eyes | Hgt | Wgt | DOB |
|---|---|---|---|---|---|---|
| | | | | | | |

| Cnt | Arrest Charges | Dispo Date | Result |
|---|---|---|---|
| 1 | PC 602(N) | | |
| | TRESPASSING | | |

| File Date | Name | Case Number/County | Last Dept/Div | Warrants Issued |
|---|---|---|---|---|
| 02/16/1988 | 6 | LAP88S0061601/LOS ANGE | | 1 |

| Cnt | Filed Charges | Dispo Date | Dispo | Sentence/Probation Type |
|---|---|---|---|---|
| 01 | PC 602(N) | 06/16/1988 | Convicted | |
| | TRESPASSING | | | SUMM PROB 24 MONTH(S) AND 30 DAY(S) LA COUNTY JAIL |

| Arr Date | Name | Arresting Agency | Booking Number |
|---|---|---|---|
| | | | |

| Sex | Race | Hair | Eyes | Hgt | Wgt | DOB |
|---|---|---|---|---|---|---|
| | | | | | | |

[ER 148]

| File Date | Name | Case Number/County | Last Dept/Div | Warrants Issued |
|---|---|---|---|---|
| | | COMM08456/LOS ANGELES | | NONE |

| Cnt | Filed Charges | Dispo Date | Dispo | Sentence/Probation Type |
|---|---|---|---|---|
| 01 | PC 148.9 | 11/08/1988 | NOLO CONTENDERE | |
| | FALSE ID TO PEACE OFFICER | | | 12 MOS PROB, $705FN |

| Arr Date | Name | Arresting Agency | Booking Number |
|---|---|---|---|
| | | | |

| Sex | Race | Hair | Eyes | Hgt | Wgt | DOB |
|---|---|---|---|---|---|---|
| | | | | | | |

| File Date | Name | Case Number/County | Last Dept/Div | Warrants Issued |
|---|---|---|---|---|
| | 3 | SC TA029002/LOS ANGELE | | NONE |

| Cnt | Filed Charges | Dispo Date | Dispo | Sentence/Probation Type |
|---|---|---|---|---|
| 01 | PC 12021(A) | 03/10/1994 | Convicted | |
| | POSS FIREARM BY FELON/ETC | | | 016 MONTHS PRISON |

PENDING CASES OR UNKNOWN DISPOSITIONS

| Arr Date | Name | Arresting Agency | Booking Number |
|---|---|---|---|
| | | | |

| Sex | Race | Hair | Eyes | Hgt | Wgt | DOB |
|---|---|---|---|---|---|---|
| | | | | | | |

| File Date | Name | Case Number/County | Last Dept/Div | Warrants Issued |
|---|---|---|---|---|
| | | COM88M0845/LOS ANGELES | | NONE |
| 01 | PC 148.9 | | | |
| | FALSE ID TO PEACE OFFICER | | | |

ARRESTS/CASES/CUSTODY NOT REPORTED ABOVE

| Arr Date | Name | Arresting Agency | Booking Number |
|---|---|---|---|
| 05/16/2003 | 3 | LASD – CENTURY STATION PATROL | 007696436 |

| [ER 149] Sex | Race | Hair | Eyes | Hgt | Wgt | DOB |
|---|---|---|---|---|---|---|
| M | BLACK | BLACK | BROWN | 510 | 212 | [Date Of Birth Omitted] |

| Cnt | Arrest Charges | Dispo Date | Result |
|---|---|---|---|
| 1 | 12031A2FPC | 05/20/2003 | Insufficient Evidence |
| 2 | PC 12021(A) (1)<br>POSS FIREARM BY FELON/ETC | 05/20/2003 | Insufficient Evidence |

| File Date | Name | Case Number/County | Last Dept/Div | Warrants Issued |
|---|---|---|---|---|
| (NO CASE FILING INFORMATION FOUND IN L.A. COUNTY) | | | | |

| Arr Date | Name | Arresting Agency | Booking Number |
|---|---|---|---|
| 09/09/2001 | 3 | LAPD – WILSHIRE DIVISION | 007009827 |

| Sex | Race | Hair | Eyes | Hgt | Wgt | DOB |
|---|---|---|---|---|---|---|
| M | BLACK | BLACK | BROWN | 510 | 205 | [Date Of Birth Omitted] |

| Cnt | Arrest Charges | Dispo Date | Result |
|---|---|---|---|
| 1 | PC 243(E)<br>BATTERY – SPECIFIC PERSON | | Court Order for Release<br>WARRANT #0000000000 |

| File Date | Name | Case Number/County | Last Dept/Div | Warrants Issued |
|---|---|---|---|---|
| (NO CASE FILING INFORMATION FOUND IN L.A. COUNTY) | | | | |

| Arr Date | Name | Arresting Agency | Booking Number |
|---|---|---|---|
| 06/27/2000 | 2 | LAPD – COMMUNICATIONS CENTER | 0 |

| Sex | Race | Hair | Eyes | Hgt | Wgt | DOB |
|---|---|---|---|---|---|---|

| Cnt | Arrest Charges | Dispo Date | Result |
|---|---|---|---|
| 1 | NO ARREST RECEIVED | UNKNOWN | UNKNOWN |
| [ER 150] 2 | PC 246.3<br>DISCHARGE FIREARM/PUBLIC | UNKNOWN | UNKNOWN |

| File Date | Name | Case Number/County | Last Dept/Div | Warrants Issued |
|---|---|---|---|---|
| 07/25/2000 | 3 | XCNBA2036O301/LOS ANGE | 124 | 1 |

| Cnt | Filed Charges | Dispo Date | Dispo | Sentence/Probation Type |
|---|---|---|---|---|
| 01 | PC 246.3<br>DISCHARGE FIREARM/PUBLIC | 10/06/2000 | Dismissal in furth of justice per 1385 PC | |

| Arr Date | Name | Arresting Agency | Booking Number |
|---|---|---|---|
| 06/27/2000 | 2 | LASD – COURT SERVICES — WEST BUREAU | 006511563 |

| Sex | Race | Hair | Eyes | Hgt | Wgt | DOB |
|---|---|---|---|---|---|---|
| M | BLACK | BLACK | BROWN | 510 | 210 | [Date Of Birth Omitted] |

| Cnt | Arrest Charges | Dispo Date | Result |
|---|---|---|---|
| 1 | CO RET | | Dismissed<br>WARRANT #CENBA203603 |

| File Date | Name | Case Number/County | Last Dept/Div | Warrants Issued |
|---|---|---|---|---|
| (NO CASE FILING INFORMATION FOUND IN L.A. COUNTY) | | | | |

| Arr Date | Name | Arresting Agency | Booking Number |
|---|---|---|---|
| 01/24/2000 | 2 | CALIF INSTITUTION FOR MEN – CHINO | E28553:CUST:0001 |

| Sex | Race | Hair | Eyes | Hgt | Wgt | DOB |
|---|---|---|---|---|---|---|

| Cnt | Arrest Charges | Dispo Date | Result |
|---|---|---|---|
| 1 | | UNKNOWN | UNKNOWN |
| | VIOLATION OF PAROLE | | |

| File Date | Name | Case Number/County | Last Dept/Div | Warrants Issued |
|---|---|---|---|---|
| | | (NO CASE FILING INFORMATION FOUND IN L.A. COUNTY) | | |

[ER 151]

| Arr Date | Name | Arresting Agency | Booking Number |
|---|---|---|---|
| 10/07/1999 | 3 | LAPD – NARCOTICS GROUP SOUTH BUREAU | 006218904 |

| Sex | Race | Hair | Eyes | Hgt | Wgt | DOB |
|---|---|---|---|---|---|---|
| M | BLACK | BLACK | BROWN | 510 | 185 | [Date Of Birth Omitted] |

| Cnt | Arrest Charges | Dispo Date | Result |
|---|---|---|---|
| 1 | PC 12020(A) | 10/12/1999 | Time Served |
| | POSSESS/SELL/MFG DANGEROUS WEAPON | | WARRANT #COM107527 |
| 2 | PC 3056 | 10/12/1999 | Request for Information/Investig |
| | PAROLE VIOLATION – FELONY | | WARRANT #2990616049 |
| 3 | PC 12020(A) | | Dismissed |
| | POSSESS/SELL/MFG DANGEROUS WEAPON | | WARRANT #COMTA10209401 |

| File Date | Name | Case Number/County | Last Dept/Div | Warrants Issued |
|---|---|---|---|---|
| 11/03/1999 | 3 | COMTA10209401/LOS ANGE | 10 | 1 |

| Cnt | Filed Charges | Dispo Date | Dispo | Sentence/Probation Type |
|---|---|---|---|---|
| 01 | PC 12020(A) | 01/10/2000 | Court found insufficient cause | |
| | POSSESS/SELL/MFG DANGEROUS WEAPON | | | |

| Arr Date | Name | Case Number/County | Booking Number |
|---|---|---|---|
| 10/31/1997 | 2 | CORRECTIONS STATE DEPARTMENT | E28553:CUST:9710 |

| Sex | Race | Hair | Eyes | Hgt | Wgt | DOB |
|---|---|---|---|---|---|---|

| Cnt | Arrest Chares | Dispo Date | Result |
|---|---|---|---|
| 1 | | UNKNOWN | UNKNOWN |
| | VIOLATION OF PAROLE | | |

| File Date | Name | Case Number/County | Last Dept/Div | Warrants Issued |
|---|---|---|---|---|
| | | (NO CASE FILING INFORMATION FOUND IN L.A. COUNTY) | | |

| Arr Date | Name | Arresting Agency | Booking Number |
|---|---|---|---|
| *08/22/1997 | 9 | LASD – INMATE RECEPTION CENTER (IRC) | 005358732 |

[ER 152]

| Sex | Race | Hair | Eyes | Hgt | Wgt | DOB |
|---|---|---|---|---|---|---|
| M | BLACK | BLACK | BROWN | 510 | 205 | [Date Of Birth Omitted] |

| Cnt | Arrest Charges | Dispo Date | Result |
|---|---|---|---|
| 1 | PC 3056 | | UNKNOWN |
| | PAROLE VIOLATION – FELONY | | WARRANT #999999999 |

| File Date | Name | Case Number/County | Last Dept/Div | Warrants Issued |
|---|---|---|---|---|
| | | (NO CASE FILING INFORMATION FOUND IN L.A. COUNTY) | | |

| Arr Date | Name | Arresting Agency | Booking Number |
|---|---|---|---|
| 08/25/1995 | 2 | CORRECTIONS STATE DEPARTMENT | E28553:CUST:9508 |

| Sex | Race | Hair | Eyes | Hgt | Wgt | DOB |
|---|---|---|---|---|---|---|

| Cnt | Arrest Charges | Dispo Date | Result |
|---|---|---|---|
| 1 | HS 11378.5 | UNKNOWN | UNKNOWN |
| | PCP – POSSESSION FOR SALE | | |
| 2 | PC 12035(B)(1) | UNKNOWN | UNKNOWN |
| | WEAPONS VIOLATION | | |

| File Date | Name | Case Number/County | Last Dept/Div | Warrants Issued |
|---|---|---|---|---|
| | | (NO CASE FILING INFORMATION FOUND IN L.A. COUNTY) | | |

| Arr Date | Name | Arresting Agency | Booking Number |
|---|---|---|---|
| 03/25/1994 | 3 | CORRECTIONS STATE DEPARTMENT | E28553:CUST:9403 |

| Sex | Race | Hair | Eyes | Hgt | Wgt | DOB |
|---|---|---|---|---|---|---|

| Cnt | Arrest Charges | Dispo Date | Result |
|---|---|---|---|
| 1 | PC 12021(A) | UNKNOWN | UNKNOWN |
| | POSS FIREARM BY FELON/ETC | | |

| File Date | Name | Case Number/County | Last Dept/Div | Warrants Issued |
|---|---|---|---|---|
| | | [ER 153] (NO CASE FILING INFORMATION FOUND IN L.A. COUNTY) | | |

| Arr Date | Name | Arresting Agency | Booking Number |
|---|---|---|---|
| 03/09/1992 | 2 | CORRECTIONS STATE DEPARTMENT | E28553:CUST:9203 |

| Sex | Race | Hair | Eyes | Hgt | Wgt | DOB |
|---|---|---|---|---|---|---|

| Cnt | Arrest Charges | Dispo Date | Result |
|---|---|---|---|
| 1 | | UNKNOWN | UNKNOWN |
| | VIOLATION OF PAROLE | | |

| File Date | Name | Case Number/County | Last Dept/Div | Warrants Issued |
|---|---|---|---|---|
| | | (NO CASE FILING INFORMATION FOUND IN L.A. COUNTY) | | |

| Arr Date | Name | Case Number/County | Booking Number |
|---|---|---|---|
| 02/29/1992 | 3 | LAPD – 77TH ST. DIVISION | 002910855 |

| Sex | Race | Hair | Eyes | Hgt | Wgt | DOB |
|---|---|---|---|---|---|---|

| Cnt | Arrest Charges | Dispo Date | Result |
|---|---|---|---|
| 1 | PC 12020(A) | 03/02/1992 | DA Rejection |
| | POSSESS/SELL/MFG DANGEROUS WEAPON | | |
| 2 | PC 3056 | | |
| | PAROLE VIOLATION – FELONY | | |

| File Date | Name | Case Number/County | Last Dept/Div | Warrants Issued |
|---|---|---|---|---|
| | | (NO CASE FILING INFORMATION FOUND IN L.A. COUNTY) | | |

| Arr Date | Name | Case Number/County | Booking Number |
|---|---|---|---|
| 09/01/1989 | 3 | CORRECTIONS STATE DEPARTMENT | E28553:CUST:8909 |

| Sex | Race | Hair | Eyes | Hgt | Wgt | DOB |
|---|---|---|---|---|---|---|

[ER 154]

| Cnt | Arrest Charges | Dispo Date | Result |
|---|---|---|---|
| 1 | PC 245(A)(2) | 03/01/1991 | PAROLED FROM CDC |
| | ADW – W/FIREARM | | |

| File Date | Name | Case Number/County | Last Dept/Div | Warrants Issued |
|---|---|---|---|---|
| | | (NO CASE FILING INFORMATION FOUND IN L.A. COUNTY) | | |

| Arr Date | Name | Arresting Agency | | | | | Booking Number |
|---|---|---|---|---|---|---|---|
| 03/15/1989 | 3 | LAPD – HARBOR AREA | | | | | 001304131 |
| Sex | Race | Hair | Eyes | Hgt | Wgt | DOB | |

########RAPSHEET TRUNCATED DUE TO SIZE LIMITATIONS########

## EXHIBIT I

## [ER 156] COUNTY OF LOS ANGELES – SHERIFF'S DEPARTMENT – SUPPLEMENTARY REPORT

DATE: 10/22/03
C: Assault with a Deadly Weapon (firearm), 245(a)(2) P.C.; Spousal Battery, 243(e)(1) P.C.
V: Kelly, Shelly FB/38
S: Bowen, Jerry MB/34

FILE: 403-10148-0371-051
ACTION: Active/ Additional Info./ Victim & Witness Interviewed

### NARRATIVE

EV-3-1-Digital disk, "Maxell", containing photographs of injuries to V/ Kelly.

EV-4-1-Video tape of interview with V/ Kelly & W/ Floyd

EV-5-1-Los Angeles County Sheriff's Department citation #N316829, issued to S/ Bowen.

The purpose of this report is to provide active/ additional information under the above file number.

On 10-22-03 at approximately 1400 hrs., I met and interviewed V/ Kelly at Lennox Sheriff's Station. This interview was video taped and the following is a brief synopsis of what occurred.

I started the interview by going over the "Incident Report" with V/ Kelly. I told V/ Kelly if there were any changes, or anything that needed to be

added to the report, to let me know at that time. While going over the report V/ Kelly told me that S/ Bowen and she have had a dating relationship since April 2003. V/ Kelly said during that time, S/ Bowen has hit her on two previous occasions, which V/ Kelly did not report to police. V/ Kelly said S/ Bowen has a violent nature and has told her if she ever tries to leave him, he would kill her.

APPROVED: Sgt. Kelleher #244884 [Illegible]
BY: Det. C. Messerschmidt #283271

ASSIGNED: SSB/OSS/LNX

SECRETARY: _____

DATE: _____ TIME: _____

[ER 157] I asked V/ Kelly if S/ Bowen lives with her at the location. V/ Kelly told me, "No, he has a key to my place, but he only stays with me from time to time". I asked V/ Kelly to tell me in her own words, what happened during the incident. V/ Kelly then told me the following:

V/ Kelly told me she had already decided to brake off the relationship with S/ Bowen and to move out from her current residence. Due to S/ Bowen's violent history with her, she called for the police to watch over her while she gathered some of her personal property. V/ Kelly said after approximately 20 minutes of the deputies arrival, the Deputies told her they had to leave for an emergency call and would return later. V/ Kelly said as soon as the deputies left the area, S/ Bowen appeared and confronted her.

V/ Kelly said S/ Bowen stated, "I told you not to call the cops on me, bitch". V/ Kelly said S/ Bowen then grabbed her by the front of her shirt with both hands and began hitting her. V/ Kelly said she was able to pull away from S/ Bowen, but that he again grabbed her by the arms. V/ Kelly said S/ Bowen and she began to struggle with each other for several seconds. V/ Kelley said S/ Bowen tried to throw her over the railing of the second story landing, but she was able to keep herself from going over.

V/ Kelley said as the struggle continued, S/ Bowen bit her on the right shoulder and grabbed her by her hair. V/ Kelly said S/ Bowen tried to drag her, by the hair, into her residence. V/ Kelly said she sat on the ground and placed both legs on either side of the doorway, preventing S/ Bowen from dragging her inside. V/ Kelly said S/ Bowen grabbed her again by the arms, at which time, she was able to pull out of her shirt and began to run to her car. V/ Kelly said S/ Bowen went into her residence and returned with a sawed off shotgun with a pistol grip. V/ Kelly said S/ Bowen ran in front of her car and pointed the shotgun at her. S/ Bowen then stated, "If you try to leave, I'll kill you bitch!!".

V/ Kelly said she quickly leaned over in her seat, and punched the gas pedal of her car. V/ Kelly told me, S/ Bowen jumped out of the way of the car, and shot at her, hitting the left front driver's side tire. V/ Kelly said as she continued driving, she heard 4 four more shotgun blasts, and saw S/ Bowen chasing her on foot, in her rearview mirror. V/ Kelly said she

was able to drive away and flagged down the first police officer (LAPD Officers) she could find.

V/ Kelly then showed me several bruises she received during the struggle with S/ Bowen. I saw bruises on V/ Kelly's left forearm and both inner biceps. I also saw a large, what appeared to be, bite mark on V/ Kelly's right rear shoulder area. I took digital photographs of the injuries (EV-3) and book the disk into evidence. V/ Kelly also provided me with a citation S/ Bowen received on 08-29-03 (EV-5) with a court appearance date of 11-04-03 at Compton Court.

I told V/ Kelly even though she knows that S/ Bowen assaulted her, I needed her to identify him in a photo line up. I read V/ Kelly the "Witness Admonition – Mug Show Ups" form and had her sign the bottom of the form. I then placed a photo line up (six pack) containing S/ Bowen in front of V/ Kelly. V/ Kelly immediately pointed to the bottom middle picture and stated, "That's him right there". I had V/ Kelly circle the individual she identified and sign her name below the photo. The person V/ Kelly identified is Jerry Ray Bowen MB/[Date Of Birth Omitted].

[ER 158] I also showed V/ Kelly the photo's of S/ Bowen which the deputies took and booked into evidence. V/ Kelly told me the photo of S/ Bowen holding the shotgun, is the same shotgun he used the night of this incident. V/ Kelly also told me that during this incident, there were several witnesses who observed S/ Bowen hit and shoot at her. V/ Kelly

said she would try to contact some of the witnesses and have them come in to be interviewed.

I ended my interview with V/ Kelly at this time. The investigation is continuing pending additional reports, witness interviews and obtaining a Search and Ramey Warrant for S/ Bowen.

On 10-23-03, V/ Kelly telephone me at approximately 1530 hrs., and told me she was coming into Lennox Station with a witness and would be at the station between 1800 & 2000 hrs. At approximately 1915 hrs., V/ Kelly and a male black adult (later identified as Gerry Lavel Floyd MB/A) arrived at Lennox Sheriff's Station: I contacted V/ Kelly who told me that Mr. Floyd was a witness to the incident on 10-17-03.

I escorted both individuals to the OSS office and had V/ Kelly remain there, while I took Mr. Floyd to the interview room. This interview was video taped and the following is a brief synopsis of what occurred. I asked Mr. Floyd (referred to as W/ Floyd from here forward) to tell me what occurred on the night of the incident. W/ Floyd told me the following:

W/ Floyd said he was asked by V/ Kelly to help her move out of 1425 W. 97th Street, Los Angeles. W/ Floyd stated that while he was there, deputies were standing by in case V/ Kelly's boyfriend (S/ Bowen) showed up and tried to start trouble. W/ Floyd said he heard one of the deputies tell V/ Kelly they had to leave for an emergency call and would return later. W/ Floyd said as soon as the

deputies left, S/ Bowen appeared out from the bushes and asked W/ Floyd, "What are you doing?". W/ Floyd told S/ Bowen he was helping Shelly (V/ Kelly) move out of her house.

W/ Floyd stated S/ Bowen immediately walked up the stairs and confronted V/ Kelly. W/ Floyd said S/ Bowen told V/ Kelly he wanted to talk with her and to walk into the apartment. V/ Kelly refused and told S/ Bowen if he wanted to speak with her to do it where they were standing. W/ Floyd said he then observed S/ Bowen hit V/ Kelly with his fist. W/ Floyd said he ran in between the two of them in an effort to keep S/ Bowen from hitting V/ Kelly again. W/ Floyd said S/ Bowen continued his assault on V/ Kelly by swing his arms at V/ Kelly and hitting her at least one more time with his fist.

W/ Floyd said V/ Kelly was able to get away from S/ Bowen and run toward her car. W/ Floyd said S/ Bowen looked at him and stated, "I'll show you, I'll show you!". W/ Floyd said S/Bowen walked into V/ Kelly's apartment and went to one of the closets. W/ Floyd said S/ Bowen came out of the apartment holding a sawed off shotgun with a wooden pistol grip and ran after V/ Kelly. W/ Floyd said he then saw S/ Bowen raise the shotgun, and point it at V/ Kelly. W/ Floyd then observed S/ Bowen fire one round in V/ Kelly's direction, missing V/ Kelly. S/ Bowen continued running to the front of V/ Kelly's car and pointed the shotgun directly at V/ Kelly.

[ER 159] W/ Floyd said he saw S/ Bowen fire another round at V/ Kelly, striking the left front part of her car. W/ Floyd said he last saw S/ Bowen running westbound on 97th Street behind V/ Kelly's vehicle, then southbound toward Century Boulevard and out of his view.

I asked W/ Floyd if he could identify S/ Bowen if he saw him again at a later time. W/ Floyd stated, "Yes, I've seen him before in the past.". W/ Floyd also told me he would cooperate fully when court proceeding begin. I told W/ Floyd I wanted to show him a photo line up to see if he could identify S/ Bowen. Prior to showing any photographs to W/ Floyd, I advised him of the, "Witness Admonition Mug Show Ups" form. W/ Floyd stated he understood the form and signed at the bottom of the form. I then placed a photo line up in front of W/ Floyd. W/ Floyd immediately pointed to the bottom middle picture and stated, "Him right there, that's him!". I had W/ Floyd circle the individual he identified and sign his name at the bottom of the photo. W/ Floyd signed his name and also wrote, "The person I saw hit and shoot at Shelly (V/ Kelly) 10-23-03.".

I ended my interview with W/ Floyd at this time. The investigation is continuing pending possible additional witness interviews and obtaining a warrant for S/ Bowen.

---

[ER 160] LOS ANGELES COUNTY
SHERIFF'S DEPARTMENT
SAFE STREETS BUREAU
OPERATION SAFE STREETS
LENNOX SHERIFF'S STATION

DATE: 10-22-03

FILE: 403-10148-0371-051

WITNESS ADMONITION – MUG SHOW – UPS

1. YOU ARE ABOUT TO VIEW A SERIES OF SIX PHOTOGRAPHS OF SIMILAR APPEARING INDIVIDUALS.
2. THE SUSPECT WHO WAS INVOLVED IN THE CRIME MAY OR MAY NOT BE AMONG THESE PHOTOGRAPHS.
3. YOU ARE UNDER NO OBLIGATION TO MAKE AN IDENTIFICATION.
4. THE PURPOSE OF SHOWING YOU THESE PHOTOGRAPHS IS TO ELIMINATE THE INNOCENT AS WELL AS TO IDENTIFY THE PERSON RESPONSIBLE.

AMONESTACION A TESTIGOS –
MOSTRACION DE POTOGRAFIA "MUG"

1. Usted va a mirar un seria de seis fotografias de individos de aparencia parecida.
2. El sospechado implicado en este crimen puede o no puede ester entre estas fotografias.

3. Usted no esta obligado de hacer una identificacion.

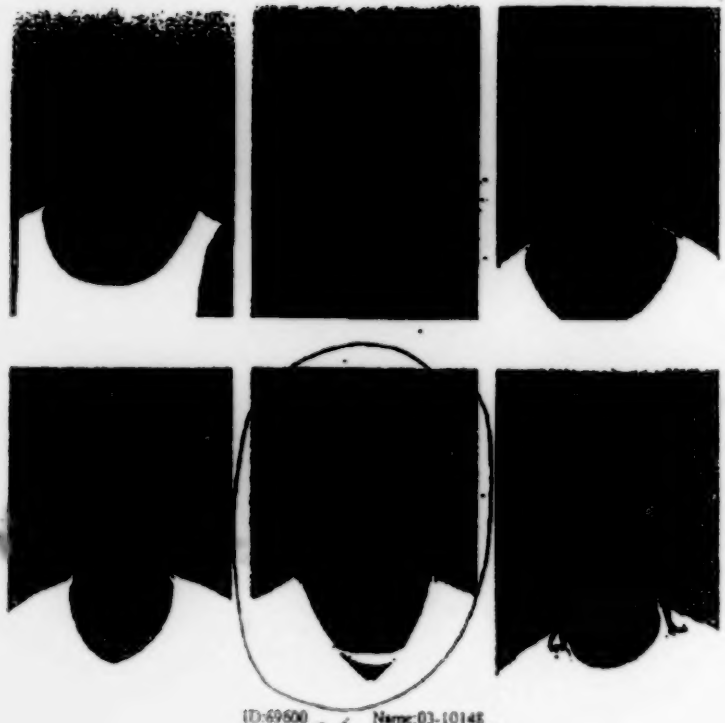
4. El objeto de demostrarle estas fotografias es para eliminar a personas-inocentes y para identificar a la persons que esten culpable.

NAME/ NOMBRE: KELLY, SHELLY DATE/ FECHA: 10-22-03

SIGNED/FIRMA: x /s/ Shelly Kelly

WITNESS: MESSERSCHMIDT #283271 DATE: 10-22-03

403-10148-0111-051



ID:69600 Name:03-10148

Shelly Kelly

[ER 162] LOS ANGELES COUNTY
SHERIFF'S DEPARTMENT
SAFE STREETS BUREAU
OPERATION SAFE STREETS
LENNOX SHERIFF'S STATION

DATE: 10-23-03

FILE: 403-10148-0371-051

WITNESS ADMONITION – MUG SHOW – UPS

1. YOU ARE ABOUT TO VIEW A SERIES OF SIX PHOTOGRAPHS OF SIMILAR APPEARING INDIVIDUALS.
2. THE SUSPECT WHO WAS INVOLVED IN THE CRIME MAY OR MAY NOT BE AMONG THESE PHOTOGRAPHS.
3. YOU ARE UNDER NO OBLIGATION TO MAKE AN IDENTIFICATION.
4. THE PURPOSE OF SHOWING YOU THESE PHOTOGRAPHS IS TO ELIMINATE THE INNOCENT AS WELL AS TO IDENTIFY THE PERSON RESPONSIBLE.

AMOMESTACION A TESTIGOS –
MOSTRACION DE POTOGRAFIA -"MUG"

1. Usted va a mirar un seria de seis fotografias de individos de aparencia parecida.
2. El sospechado implicado en este crimen puede o no puede estar entre estas fotografias.

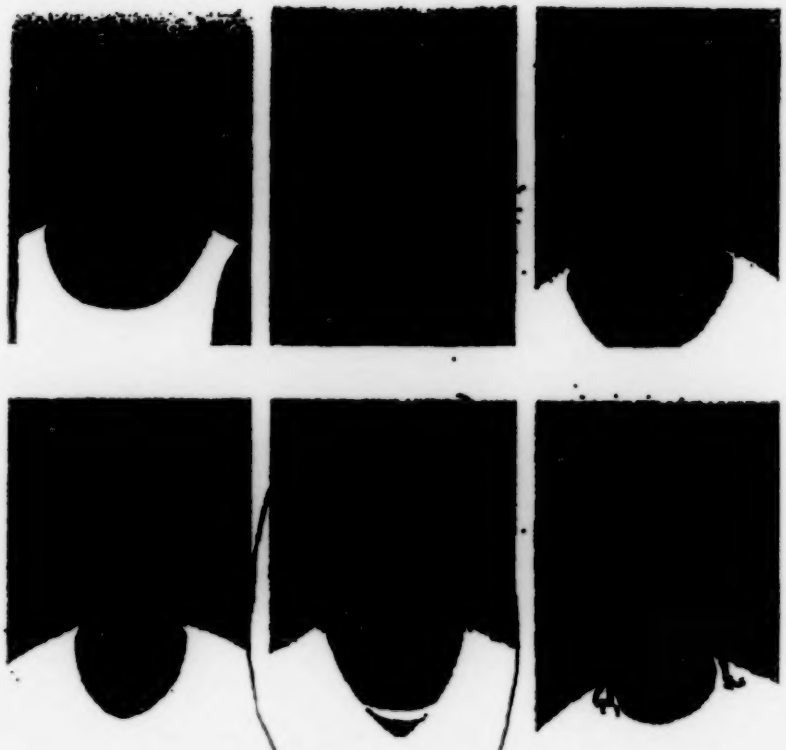
3. Usted no este obligado de hacer una identificacion.

4. El objeto de demostrarle estas fotografias es para eliminar a personas inocentes y para identificar a la persons que esten culpable.

NAME/ DATE/
NOMBRE: FLOYD, GERRY L FECHA: 10-23-03

SIGNED/FIRMA: x /s/ Gerry Floyd

MESSERSCHMIDT
WITNESS: #283271 DATE: 10-23-03




Terry Lloyd
He personnel saw hit and
Shoot at Shelby 10-23-03

**EXHIBIT K**

**SEARCH WARRANT NO. 9383**

**[ER 169] STATE OF CALIFORNIA**
**COUNTY OF LOS ANGELES**
**RETURN TO SEARCH WARRANT**

DETECTIVE CURT A. MESSERSCHMIDT, BEING SWORN, SAYS THAT HE CONDUCTED A SEARCH PURSUANT TO THE BELOW DESCRIBED SEARCH WARRANT:

ISSUING MAGISTRATE: Judge Eudon Ferrell

MAGISTRATES COURT: Inglewood Superior Court, Division 2, Southwest Judicial District.

DATE OF ISSUANCE: 11-04-2003.

DATE OF SERVICE: 11-06-2003.

AND SEARCHED THE FOLLOWING LOCATION(S), VEHICLE(S), AND PERSON(S): 2234 E. 120th Street, Los Angeles. The following person(s) were detained and searched: 1) Diane-Johnson FB/[Date of Birth Omitted], Theodore Millender MB/[Date of Birth Omitted], Willie Millender MB/[Date of Birth Omitted], David Millender MB/[Date of Birth Omitted], Brenda Millender FB/[Date of Birth Omitted], Aygusta Millender FB/[Date of Birth Omitted], Vicki Fairman FB/[Date of Birth Omitted], Calvin Johnson MB/[Date of Birth Omitted], Michael Johnson MB/[Date of Birth Omitted], and William Johnson MB/[Date of Birth Omitted]. The primary suspect (Jerry Bowen) was not present at the location.

AND SEIZED THE ITEMS FROM EACH LOCATION(S) DESCRIBED AS: (1) State of California Social Services letter addressed to Jerry Bowen

(suspect), (2) 1-shotgun, "Mossberg" 12 gauge, black in color with wooden stock serial # J324807, (3) 1-box of 45 cal. "American Eagle" rounds. The primary weapon sought (shotgun) was not found at the location.

I FURTHER SWEAR THAT THIS IS A TRUE AND DETAILED ACCOUNT OF ALL PROPERTY TAKEN BY ME PURSUANT TO THE SEARCH WARRANT, AND THAT PURSUANT TO PENAL CODE SECTION 1528 AND 1536 THIS PROPERTY WILL BE RETAINED IN MY CUSTODY, SUBJECT TO THE ORDER OF THIS COURT OR OF ANY OTHER COURT IN WHICH THE OFFENSE IN RESPECT TO WHICH THE SEIZED PROPERTY IS TRIABLE.

Curt Messerschmidt #283271
Signature of Affiant

SWORN TO AND SUBSCRIBED BEFORE ME THIS 18th DAY OF NOV. 2003

Eudon Ferrell
Signature of Magistrate

JUDGE OF THE SUPERIOR COURT, INGLEWOOD, SOUTHWEST JUDICIAL DISTRICT.

**EXHIBIT JJ**

[ER 473] State of California

Department of Social Services — A Batt
Disability and Adult Programs Division
P.O. Box 54498
Los Angeles, CA 90054-9829
Hearing Impaired Only:Call 711-Cailfornia Relay Service or TDD 866-806-7285

June 16, 2003

JERRY RAY BOWEN
2234 E 120TH ST
LOS ANGELES, CA 90059

SSN: [Social Security Number Omitted]
DDS CASE NUMBER: 405686
CONTRACT NUMBER: 1611473

This is to remind you of your examination scheduled with:

EAST WEST FAMILY MEDICAL GROUP
3680 IMPERIAL HWY
STE 300
LYNWOOD, CA 90262
Telephone: (310) 631-8663
on 6/26/03 at 10:20 a.m.
for a Mental exam.

In order for this agency to evaluate your claim, you must keep this appointment. The cost of the examination will be paid by this agency. The examination is for evaluation only, not treatment.

All the instructions in the original appointment letter still apply. Please bring a picture identification to the examination.

IF YOU FAIL TO APPEAR FOR THIS APPOINTMENT WITHOUT GOOD CAUSE, THE DECISION WILL BE MADE BASED ON THE INFORMATION CURRENTLY IN YOUR CASE AND YOU MAY BE FOUND NOT DISABLED OR BLIND.

If you have been sent to a medical or mental evaluation for a Medi-Cal claim within the last 6 months, please call me immediately at the number below.

If for any reason you cannot keep this appointment, telephone me immediately at (213) 736-7581. You may call collect, station-to-station through the operator.

Annlae M. Battey/W07, Disability Eval. Analyst I

DEP 006 (11/01A)

No. 10-704

# In The Supreme Court of the United States

CURT MESSERSCHMIDT and ROBERT J. LAWRENCE,

*Petitioners,*

vs.

AUGUSTA MILLENDER, BRENDA MILLENDER, WILLIAM JOHNSON,

*Respondents.*

**On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## JOINT APPENDIX
## VOLUME II, Pages 99-394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**Petition For Writ Of Certiorari Filed November 22, 2010**
**Certiorari Granted June 27, 2011**

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

| | |
|---|---|
| AUGUSTA MILLENDER, BRENDA MILLENDER, WILLIAM JOHNSON,<br><br>Plaintiff,<br><br>vs.<br><br>COUNTY OF LOS ANGELES, LOS ANGELES COUNTY | Case No. CV 05-2298 DDP (RZx)<br><br>**Motion No. 1(by individual Defendants): DEFENDANTS' NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT AND/OR SUMMARY** |

SHERIFF'S DEPARTMENT, LEROY BACA; et al.

Defendants.

**ADJUDICATION OF ISSUES; MEMORANDUM OF POINTS AND AUTHORITIES; DECLARATIONS OF CURT ALAN MESSERSCHMIDT, SCOTT WILLIAM WALKER, EUGENE P. RAMIREZ, SANDRA HUTCHENS**

(Filed Sep. 18, 2006)

*[Filed concurrently with Separate Statement of Uncontroverted Facts and Conclusions of Law; Notice of Joinder; Appendix of Exhibits; and Proposed Order]*

**Date: October ~~16~~ [23], 2006**
**Time: 10:00 a.m.**
**Courtroom: "3"**

TO ALL PARTIES AND THEIR ATTORNEYS:

PLEASE TAKE NOTICE THAT on October ~~16~~, [23], 2006, in Courtroom 3, at 10:00 a.m., or as soon thereafter as the matter may be heard, in the above-captioned court, [ER 2] located at 312 N. Spring Street, Los Angeles, California 90012, ***the individual defendants,*** SCOTT WALKER, RICK RECTOR, DONALD NICHIPORUK, RICHARD SCHLEGEL, (erroneously sued as M. SCHLEGEL), DEPUTY BRICE

STELLA (erroneously sued as D. STELLA), JACK DEMELLO, (erroneously sued as J. DERNELLO), DAVID O'SULLIVAN, JAMES RITENOUR, IAN STADE, ROBERT J. LAWRENCE, and CURT MESSERSCHMIDT, will move for summary judgment or, in the alternative, for summary adjudication on plaintiff's Complaint. For purposes of judicial economy, a separate motion for summary judgment has been filed on behalf of ***the municipal defendants***.

[The remaining individual defendants have been dismissed: Raymond Bercini, John Bones, Jeffrey Cale, Richard Conti, Mark Desmarteau, Christopher Faulkner, Leo Foisner, Phillip Geisler, Thomas Harris, Patrick Hayes, William Murray, Henry Ortega, Carlos Parga, William Pickett, Michael Valento, and Michael Wilber.]

**Federal Claims:**

1. Plaintiff cannot maintain a § 1983 claim under any theory of law because the undisputed facts do not give rise to a constitutional violation, and all defendants are entitled to qualified immunity. (Undisputed Facts Nos. 1-75.)

2. The first federal claim under § 1983 against all Defendants lack merits because the undisputed facts do not give rise to a constitutional violation, and all defendants are entitled to qualified immunity. (Undisputed Facts Nos. 1-75.)

3. The second federal claim under § 1983 against all Defendants lacks merit because the undisputed

facts do not give rise to a constitutional violation, and all defendants are entitled to qualified immunity. (Undisputed Facts Nos. 1-75.)

4. The third federal claim under § 1985(3) against all Defendants lacks merit because the undisputed facts do not give rise to a constitutional violation, and all defendants are entitled to qualified immunity. (Undisputed Facts Nos. 1-75.)

The state claims are addressed in the Motion No. 2 brought by the municipal defendants.

[ER 3] This motion is based on this Notice of Motion, Memorandum of Points and Authorities, Statement of Uncontroverted Facts and Conclusions of Law, Declarations of Curt Alan Messerschmidt, Scott William Walker, Eugene P. Ramirez, and Sandra Hutchens, the exhibits, pleadings and files in this action, and such other matters as the court deems proper.

The motion is made following conference of counsel on July 10, and August 29, 2006, under Local Rule 7-3.

Dated: September 18, 2006

MANNING & MARDER
KASS, ELLROD, RAMIREZ LLP

By: /s/ [Illegible]
Eugene P. Ramirez
Attorneys for Defendants
COUNTY OF LOS ANGELES, et al.

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## [ER 7] MEMORANDUM OF POINTS AND AUTHORITIES

### 1. INTRODUCTION AND SUMMARY OF ARGUMENT.

On November 6, 2003, sheriff's deputies served a high-risk search and arrest warrant at 2234 E. 120th Street ("120th Street location"), Los Angeles, California. The warrant suspect was a known Mona Park Crip gang member, had a record of violence, presented a three-strike risk, and had fired a sawed off shot gun at his girlfriend when his attempt to throw her over the second-story balcony failed. As demonstrated below, based on the undisputed facts, the individual defendants are entitled to summary judgment based on qualified immunity. *Saucier v. Katz*, 533 U.S. 194, 200 (2001). Plaintiffs were not arrested or subjected to excessive force. They were not injured. The deputies' brief entry, search and detention of plaintiffs were permissible because there was probable cause to search the 120th Street location for the suspect. In addition, the deputies complied with knock/notice requirements. Plaintiff cannot maintain a § 1983 claim under any theory of law because the undisputed facts do not give rise to a constitutional violation, and all defendants are entitled to qualified immunity.

### 2. STATEMENT OF FACTS.

#### a. October 17, 2003 Assault by Suspect Bowen.

On October 17, 2003, at 1425 W. 97th Street in Los Angeles ("97th Street location"), the suspect,

Jerry Ray Bowen, bit his former girlfriend, Shelly Kelly, attempted to throw her from a second story balcony, and eventually fired at her with a sawed-off shotgun as she fled the scene. (Uncontroverted Facts ("UF") #1-5.)

b. **Investigation of suspect Bowen.**

Det. Curt Alan Messerschmidt ("Messer.") was assigned to investigate the Bowen/Kelly assault. Messer. checked Bowen's rap sheet/ criminal history on the California Law Enforcement Teletype System which indicated Bowen's violent history and multiple felony and misdemeanor arrests. On October 22, 2003, Messer. met with Kelly, reviewed the incident report, and verified the facts of the incident with her. Kelly told Messer. she believed Bowen was at the 120th Street address, with his foster mother, [ER 8] Augusta Millender. Bowen was not staying with her at the 97th Street address. Kelly told Messer. on the phone that she had been to the Millenders' house with Bowen prior to the assault. Kelly also stated she had been told by her neighbors that Bowen had been seen coming back to the 1425 W. 97th Street address. Messer. went to the W. 97th location a week or two prior to the search warrant and verified that Bowen was not staying at that location. (UF #6-8.)

In Messer.'s training, police officers are taught that the successful use of informants is critical in developing accurate information. Officers are taught that informants could be a citizen, victim, witness,

paid informant or a subject charged with a crime. The informant who provided information on where the suspect was residing was the victim, Kelly, who told Messer. that the suspect was residing at the 120th Street address which she knew to be his foster mother's residence. Messer. wrote the 120th Street address information on the report during the interview with Kelly. (UF #9.) Augusta Millender testified that when Jerry Bowen was living at her residence between January and March of 2003, he received mail at her house from the County and she saw Kelly at her house on at least two occasions. (UF #10.) The only other address that was a possible residence for Bowen was the 97th Street address where the assault occurred. Messer. did not believe Bowen resided at the 97th Street address because Kelly had told him that Bowen was living with his foster mother at the 120th Street address. Kelly gave Messer. a citation that had Bowen's license plate number to the motorcycle he was using. Messer. does not remember what the address on the citation was. (UF #11.)

Defendants' expert Flynn found that "any reasonable and prudent police officer with the same experience and training as Det. Messer. and, having the same knowledge and facts of the incident and investigation, would have reached the same reasonable conclusion" that Bowen did not reside at the 97th Street address. Even assuming the citation showed the W. 97th Street location, if the citation had been issued within 45 days prior, it would have been obvious to Messer. that Bowen did not reside there based upon

Kelly's statement that he lived at the 120th Street address. If the citation had been [ER 9] issued more than 45 days prior, Messer. could not have concluded that Bowen resided there based on the information Kelly had given him, and could not have so stated in a sworn affidavit. It was reasonable for Messer. to conclude that if Bowen did in fact return to Kelly's 97th Street residence, his purpose would have been to harm her, not reside there. Flynn found that "any reasonable and prudent police officer with the same experience and training as Detective Messer. and, having the same knowledge and facts of the incident and investigation, would have reached the same reasonable conclusion" that Bowen did not reside at the 97th Street address. (UF #12.)

Messer. reviewed the incident report with Kelly to make sure the information was correct, and Kelly identified Bowen in a "six pack" line up after signing the "Witness Admonition Mug Show Ups" form. Bowen was a known Mona Park Crip gang member. (UF #13.) On October 23, 2003, Messer. interviewed witness Gerry Floyd, who verified the facts of the incident. (UF #14.) Floyd identified Bowen in a "six pack" line up after signing the "Witness Admonition Mug Show Ups" form. (UF #15.)

Messer. prepared a supplemental report regarding the interviews with Kelly and Floyd and began doing further research to verify if the 120th Street address was a good address for Bowen. Messer. conducted an extensive background search on Bowen, utilizing departmental records, state computer records, and

other police agency records. Based on this extensive search and information provided by Kelly, Messer. determined that Bowen resided at the 120th Street location. Messer.'s determination was based upon specific address information provided by Kelly. Kelly stated she had an ongoing dating relationship with Bowen for five to six months, and that he also had his own set of keys to her apartment on the 97th Street address. Kelly also said she had been over at the 120th Street address with Bowen prior to the assault. Kelly stated the 120th street address was Bowen's foster mother's home. In addition, Messer. checked information about Bowen from DMV records, Cal-Gangs data entries and California criminal history records for Bowen. Messer. checked the DMV records and Cal-gangs records and the National Criminal Index Center. (UF #16, 17.)

[ER 10] Messer. did a computer search of records to verify Bowen's name, address and date of birth. Messer. checked the Consolidated Criminal History Reporting System ("CCHRS"). The CCHRS indicated that Bowen was on summary probation for spousal battery and driving on an unlicensed driver charge. Messer. also checked Bowen's DMV records. Although the DMV records indicated that as of 9/3/03, Mr. Bowen's address was the 97th Street address, the DMV records also indicated that as of 3/27/03 Bowen's address was the 120th Street address. The 120th Street address was much more believable as his current address because Ms. Kelly had just told Messer. that was his address. Also, it did not make

any sense to Messer. that Bowen would remain living at a location in which he had committed an assault with a deadly weapon which the police had investigated. Messer. had a good basis for believing that the 120th Street address was where Bowen was currently living since Kelly had told him Bowen was staying at the 120th Street address with his foster mother. In addition, Messer. checked Bowen's name on the Cal Gangs record. Bowen's name on the Gang Member Subject File Report indicates that Bowen verbally told the Century deputies that his address as of May 17, 2003 was the 120th Street address. On November 3, 2003, Messer. searched the County Warrant System, and spoke with Sgt. Carey at Century OSS to see if he was familiar with this location. Carey was familiar with the house and it was known to the station as a problem house. (UF #18.) Messer. also found out Bowen was on summary probation for spousal battery and driving on an unlicensed driver charge. (UF #19.)

Expert Flynn found that "any reasonable and prudent police officer with the same experience and training as Det. Messer. and, having the same knowledge and facts of the incident and investigation, would have reasonably concluded that the suspect resided at the 120th Street address." Flynn found "there is no reason why Detective Messer. should have disbelieved the victim inasmuch as she was in fear of her life and most assuredly would have wanted the suspect apprehended." (UF #20.)

c. **11-4-03 Search Warrant of 120th Street location.**

Messer. requested a Ramey Warrant be issued for Jerry Ray Bowen for his [ER 11] involvement in the assault crimes. The warrant affidavit was reviewed and approved by Sgt. Lawrence, Messer.'s team sergeant at Lennox Operation Safe Streets, and Lt. Ornales. Deputy DA Janet Wilson also reviewed and approved the warrant. Everything Messer. wrote on the warrant affidavit was truthful and accurate based on his investigation of the facts. (UF #21.) Defendants' expert Flynn found Messer.'s Affiant Statement and Statement of Probable Cause were complete and accurate. (UF #22.)

Messer. requested that the Search Warrant be endorsed for night service because the primary suspect had gang ties to the Mona Park Grip gang based on information provided by Kelly and the Cal-gang data base. Messer. believed the nature of the crime – assault with a deadly weapon – showed that night service would provide an added element of safety to the community, as well as for the deputy personnel serving the warrant, based on the element of surprise. Bowen was also a 'Three-Strike' candidate with an extensive criminal background that included numerous assault and weapons charges, the door was fortified with security bars, and a sawed-off shotgun was used in the commission of the crime. Additional information indicated that other persons associated with the home, some of the Millender family members, were active Mona Park Crip gang members. Due to

Bowen's history of violence, his use of a firearm and his prior felony convictions, Messer. believed the warrant service classification should escalate from "lower-risk" to "high-risk." Also, Messer. later determined that the warrant location had a metal security door. Therefore, Messer. believed that the criteria for "high-risk" had been satisfied. On November 3, 2003, Messer. consulted with Lt. Maxwell of the LASD SEB SWAT team. As a result, the SEB SWAT team's Blue Team, under team leader Sgt. Walker, was requested to assist LASD Lennox OSS with the warrant service at the 120th Street location. (UF #23.)

Defendants' expert, Michael W. Odle, found that this decision to utilize the S.E.B. SWAT team for the warrant service was prudent and comports with SWAT deployment criteria recognized throughout the law enforcement and tactical community. (UF #24.)

Messer. believed that the items in the search warrant [weapons and evidence [ER 12] showing gang affiliation itemized in UF #25] would be in Bowen's possession and the recovery of the weapon could be invaluable in the successful prosecution of the suspect and the curtailment of other crimes. (UF #25-26.) On November 3, 2003, Messer. briefed the LASD SEB SWAT team, and went over the history of the incident, the suspect's record, and the photographs of the 120th Street location which had been taken several days before the warrant was served. The warrant service mission was assigned to the SEB SWAT team's blue team under the direction of Sergeant Walker. (UF #27.)

**d. 11-6-03 Service of Warrant.**

On November 6, 2003, at approximately 0500 hours, the Special Enforcement Bureau ("SEB") Blue Team served a high-risk search and arrest warrant at the 120th Street location. The residence was occupied by the Millender family. During the service of the search warrant, Messer. was positioned in the middle of the street to the east of the location with Det. Pickett in order to stop traffic. (UF #28.)

Walker reviewed the Search Warrant and supporting Affidavit before the search warrant was served and made sure his Team knew what was in the warrant. Walker also saw on the front page of the Search Warrant that a Deputy District Attorney had reviewed and approved the warrant before the Judge reviewed and signed the warrant. Based on the independent review by the DDA and the Superior Court Judge, Walker believed they were serving a valid search warrant and so informed the SEB deputies involved in the warrant service. (UF #29.)

In preparing for the service of the search and arrest warrant at the 120th Street location, Walker formulated a plan for service of the warrant as reflected in the Team Activation packet. (UF #30-31.) The following personnel were assigned to the following positions: Entry Team: Scott Walker, Rick Rector, Donald Nichiporuk, Richard Schlegel, Brice Stella, Jack Demello, David O'Sullivan, and James Ritenour. Containment Team: Michael Wilber, Thomas Harris, Ian Stade, William Murray, Leo Foisner, John Bones,

Phillip Geisler, Mark Desmarteau, Carlos Parga, Patrick Hayes, and Richard B. Conti. Emergency medical: J. Harrell and L. McCabe. (UF #32)

[ER 13] Defendants' expert Odle found that in the actual execution of the search and arrest warrant service, the SWAT team personnel achieved their stated "Mission" and formulated and implemented an appropriate tactical "Plan" because the planning phase and tactics chosen for entry were responsible, prudent and comport with planning operations and tactics used throughout the tactical community. (UF #33.)

Several days before the warrant service, the SEB SWAT personnel began the information and planning process based on the information given to them by Messer. regarding the wanted suspect, warrant location, and date and time of service, as reflected on the SEB Activation Request – Preliminary Data Form. The SWAT personnel developed a tactical plan for the warrant service, reviewed the search warrant, search warrant checklist, criminal history of Bowen, operations plan from Messer.'s unit, and photographs. Bowen had an extensive criminal history revolving around weapons, possession and violence, and was an active gang member with a violent background, which Walker took into consideration in formulating the plan for the warrant service. Prior to the warrant service, Walker briefed everybody on their assigned role. (UF #34.)

On November 4, 2003, two days before the service of the warrant, Walker, Rector, Nichiporuk,

Stella and Stade took photographs and looked at the area in order to determine how they were going to serve the warrant. (UF #35.)

On November 5, 2003, Walker and Stella drove around the area of the Millender [sic] to arrest Bowen if they happened to see him. Rector and Nichiporuk assisted them in a separate car. Stella and Walker contacted 4-5 male blacks who were shooting dice on the sidewalk directly in front of the Millender home. A couple of the males matched the general description of Bowen – black male, five-ten to six feet tall, around 200 pounds, early thirties. The deputies determined that the males did not live there. (UF #36.)

For the November 6, 2003, warrant service, Rector was responsible for coordinating the personnel involved in the activity and/or delegating jobs, and the first deputy to step through the door. Nichiporuk was the back-up who assisted Deputy Rector with his duties. Nichiporuk and Walker were the second and third men on the [ER 14] entry team. Schlegel and Stella were the fourth and fifth men. Demmelo [sic] was the sixth man on the entry team. O'Sullivan and Ritenour also were on the entry team. (UF #37.)

On November 6, 2003, at approximately 0500 hrs., the rear containment team (Bones and Foisner – Containment 3) were in position prior to the arrival of the remainder of the containment and entry personnel. The other containment personnel took their positions around the location as the entry team approached the front door. As the entry team and

Walker started to walk towards the front door of the house, a containment position deputy's voice came over the air and said that he could see a light on and movement at the back of the house. Walker inferred from this remark that somebody was up and moving, potentially Jerry Bowen, and believed their position was compromised. Given the suspect's violent history, the circumstances became exigent, and Walker decided to speed the process up and to gain entry into the residence. Walker considered possible destruction of evidence, the suspect having time to arm himself, officer safety and the safety of the residents inside the location. (UF #38.)

As the entry team approached the front door of the house, Walker directed that a pre-recorded knock and notice taped announcement be played over a PA system. The recording was played from a PA system at the curb in front of the Millenders' house. It was a pre-recorded search warrant announcement made some time prior to the entry. Several prerecorded announcements, identifying them as law enforcement officers and describing their intentions to serve a search warrant, were played from the vehicle public address system from the northwest corner of the lot. After Walker directed the prerecorded announcements to play, he also gave several verbal announcements, to the effect of "Sheriff's Department, we've got a search warrant. Come to the door or open the door." Walker said this two to four times. Deputy Rector banged on the door to notify the occupants there. (UF #39.)

When there was no response from the interior of the main house, Walker ordered O'Sullivan to break and rake the front window. This also meant that Deputies Schlegel and Demello should force open the front security door. Walker ordered Dep. O'Sullivan [ER 15] to break the front window of the location to allow the entry team to see into the location and protect the deputies as they tried to open the door. Walker directed that the front security door and interior door be forced open. Once the security door was opened, it allowed the entry team access into the hallway which led to the living room area of the location. They ported the window and broke the door in order to see inside the house. After listening to the audiotape of the 11-6-03 entry, Walker estimates that from the time that he asked for the announcements to be started on the tape, to when they actually gained entrance into the residence after porting the window and breaking the door, approximately 20 seconds elapsed. (UF #40.)

Defendants' expert, Michael W. Odle, found that the SWAT team personnel provided knock notice and the tactics employed were prudent and comport with tactics used throughout the tactical community. (UF #41.)

As the team entered the location, they continued to identify themselves as law enforcement personnel and said that they had a search warrant. The first group through the door was Rector, Nichiporuk, and Walker. Augusta and Brenda Millender, and William

Johnson were directed to come out of the house. (UF #42.)

Rector pointed his weapon in the direction of and to the side of Augusta and Brenda Millender. Brenda testified that the only deputy who pointed a gun at her was the one who first came through the window. Brenda did not see any other deputy use any other kind of weapon like a baton or spray. (UF #43.)

Walker's weapon briefly was pointed in the direction of Brenda, Augusta and William Johnson as they were directed outside. As the occupants were contacted, they were detained and walked outside to awaiting OSS Investigators. This allowed the entry team to safely clear the location. (UF #44.)

Messer. and Det. Pickett maintained security on Augusta, Brenda, and William Johnson until the location was cleared by SEB. Det. Pickett escorted Brenda and Augusta to the car because they were cold. Augusta Millender requested to use the restroom, and Det. Pickett told her as soon as the house was secured by SEB, they would [ER 16] escort everyone back inside and she would be allowed to use the restroom. Augusta urinated on the ground. The officer turned away so he wasn't watching her. (UF #45.)

Brenda Millender told the deputy she did not want to step outside the house onto the porch because she was a diabetic and there was glass on the ground. One of the officers took a rug from her mother's living room and threw it over the glass. The officer who

escorted her out helped her walk across the glass. (UF #46.)

Augusta and Brenda Millender and William Johnson sat in the police cars while the house was searched. Brenda told the deputy she was cold and asked the deputy for a blanket, and he gave it to her. (UF #47.)

Walker accompanied the team as the rest of the house was secured. As the entry team continued to clear the house, they came to a locked door that led into the third bedroom on the west side of the house. Believing that it would be unsafe to pass the door and being unable to acquire keys from the occupants, Walker forced the door open, splintering the door jam. Walker was in the main part of the house for approximately twenty minutes. (UF #48.)

Once the main house was cleared, the entry team went to the east side of the house and exited the kitchen which led to the entrance of a large addition that was attached to the house but had its own, outside, entrance. Walker stepped out a door from the kitchen that led to a covered area to where that front door of the addition was. Deputy Rector made the announcement for the people in the addition to come out. Walker's weapon briefly was pointed in the direction of the following people (who are not plaintiffs in this action) as they stepped out the door: Willie Millender, Ted Millender, David Millender, Calvin Johnson, Michael Johnson, Vicki Fairman,

and Diane Jackson. They all were detained by OSS investigators outside. (UF #49, 50.)

Walker then assisted in securing the remainder of the house. Walker did not handcuff anyone, or have any contact with any occupants after they were directed outside of the house. Walker did not participate in searching the house for evidence. Once the addition, out buildings and backyard were cleared and believed to be safe, the [ER 17] location was turned over to Lennox OSS investigators. (UF #51.)

The primary suspect, Bowen, was not at the location at the time of service. (UF #52.) Walker recorded the 11-6-03 entry on audiotape. (UF #53.)

The SEB team and Walker left the 120th Street location after the warrant service, somewhere past 5:45 in the morning. When they left, the OSS detectives were still there. (UF #54.) After the location was secured, the deputies brought Augusta, Brenda, and William Johnson into the living room. The deputy let Brenda go to the restroom, and go to her room to get some shoes and a blanket. (UF #55.) During the time that Augusta and Brenda were sitting in the police car, Brenda did not complain that she had injuries. Augusta never told the deputies that she had to go to the hospital. (UF #56.)

After the location was secured, Lawrence watched the occupants in the living room. He did not apply handcuffs or arrest anyone, and did not point his weapon at anyone. (UF #57.) Defendant Stade, who was assigned to containment, did not apply handcuffs

or arrest anyone, did not point his weapon, or even search the house. (UF #58.)

Once SEB left the house, Messer. went into the house and gave the search warrant to Sgt. Lawrence who gave a copy of the warrant to Augusta Millender. Dets. Faulkner, Ortega, Pickett, Valento, Cale and Bercini searched the house. Then Messer. gathered the pieces of evidence they were taking, had the property receipt signed, and they left. (UF #59.) The following evidence was recovered from the search of the 120th Street residence: 1) a State of California Social Services letter addressed to the suspect, Jerry Bowen; 2) 1-shotgun, Mossberg 12 gauge, black in color with wooden stock serial No. J324807; 3) 1 box of .45 cal "American Eagle" rounds. The primary weapon sought (shotgun) was not found at the location. (UF #60.) The deputies did not find Bowen but Det. Bercini found evidence that Bowen had lived at that location. (UF #61.)

No injuries were reported to SWAT personnel arising from the search. (UF #62.)

[ER 18] On November 19, 2003, Bowen was found at a motel, and was arrested, and later convicted of assault with a deadly weapon arising out of this incident. (UF #63.)

The preparation and execution of the search warrant had nothing to do with the Millenders' race. (UF #64.)

Plaintiffs claim the following damage: broken plate glass window; damaged wrought iron front door, broken door leading to Augusta Millender's bedroom; ripped curtains, broken chandelier, damaged throw rug. (UF #65.)

e. **Treatment of plaintiffs by Defendants.**

During the incident, only Johnson was handcuffed; Augusta and Brenda were not handcuffed. While Johnson testified that his arm was sore for the next 2-3 days as a result of the handcuffs being too tight, he also testified that the deputy did not use unnecessary force while he was handcuffing him. (UF #66.) Johnson testified that he asked the deputy if he could get the handcuffs off his hands, that he needed to be at work within an hour or so. The deputies said they would try to get him out of there within the hour. The deputies eventually took the handcuffs off Johnson. (UF #67.)

While Augusta Millender was standing outside the house, nobody pointed a gun at her and nobody pointed a gun at her while she was in the police car. (UF #68.) The deputies did not call her names, or yell at her, or touch her. The deputies were not rude to her or the occupants of the house. Johnson testified the deputies were courteous to him and turned on the heat for him. Brenda does not remember the officers being rude to her during the incident. (UF #69.) Augusta testified that none of the people in the house told Augusta they were physically abused by any of

the police officers. (UF #70.) Defendants' expert Odle found that the tactics used during the entry and search were prudent and comport with tactics used throughout the tactical community. (UF #71.)

f. **Facts re Willie Millender (not a plaintiff).**

Willie Millender (not a plaintiff) was arrested for violation of Health & Safety Code section 11550(a). (UF #72.) On August 9, 2004, a court granted a motion to quash the November 4, 2003 search warrant in the prosecution of Willie Millender (not a [ER 19] plaintiff to this action) on an unrelated charge. (UF #73.)

g. **Training of Deputies.**

The policy, custom and practice of the municipal defendants prohibits officers from conducting unconstitutional searches and/or seizes [sic], using excessive force, or otherwise violating the civil rights of any person. (UF #74.) The deputies received extensive training prior to and during their tenure with the LASD. (UF #75.)

3. **ALL DEFENDANTS ARE ENTITLED TO QUALIFIED IMMUNITY ON THE LACK OF PROBABLE CAUSE CLAIM.**

Plaintiffs assert that Defendants are liable for unreasonable search and seizure and excessive violence under the Fourth and Fourteenth Amendments

(Count 1); violation of due process under the Fourteenth Amendment (Count 2); and conspiracy to deprive plaintiffs of equal protection of the laws under § 1985(3), failure to prevent violation of §1985(3), and liability under *Monell* (Count 3). The *Monell* and state claims are addressed in the motion No. 2 brought by the municipal defendants.

In a suit against an officer for an alleged violation of a constitutional right, the court must consider, as a threshold matter, whether the officer is entitled to qualified immunity. *Saucier v. Katz* (2001) 533 U.S. 194, 200 (2001). The rule of qualified immunity "provides ample protection to all but the plainly incompetent or those who knowingly violate the law." *Estate of Ford v. Ramirez Palmer*, 301 F.3d 1043, 1049 (9th Cir. 2002), quoting *Saucier*, *supra*, 533 U.S. at 202. "Therefore, regardless of whether the constitutional violation occurred, the [official] should prevail if the right asserted by the plaintiff was not 'clearly established' or the [official] could have reasonably believed that his particular conduct was lawful." *Romero v. Kitsap County*, 931 F.2d 624, 627 (9th Cir.1991). Officers can have a reasonable, but mistaken," belief about the facts or law and still be entitled to qualified immunity. *Ibid.*

Plaintiffs assert the search of their residence was illegal because Det. Messer.'s affidavit supporting the search warrant lacked probable cause. (Complaint, ¶11.) As a matter of law, the search warrant was supported by probable cause. Moreover, any [ER 20] mistakes of fact or law Det. Messer. may have made

were reasonable, entitling him to qualified immunity. The officers who searched the house reasonably relied on the search warrant and also are entitled to qualified immunity. *Saucier*, 533 U.S. at 205.

a. **The Warrant Was Supported by Probable Cause.**

In *Illinois v. Gates*, 462 U.S. 213 (1983), the Supreme Court recognized that "affidavits 'are normally drafted by nonlawyers in the midst and haste of a criminal investigation. Technical requirements of elaborate specificity once exacted under common law pleadings have no proper place in this area." *Id.* at 235 (citation omitted).

> "The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is ***a fair probability*** that contraband or evidence of a crime will be found in a particular place. And the duty of a reviewing court is simply to ensure that the magistrate had a 'substantial basis for . . . [concluding]' that probable cause existed." *Id.* at 238-239 (emphasis added; citations omitted).

Here, the "fair probability" test is satisfied because the information obtained by Det. Messer. demonstrated a fair probability that the suspect Bowen was in fact residing at his foster mother's house at

the 120th Street address: Ms. Kelly told Det. Messer. that Bowen was not staying with her on the 97th Street address, but that he was staying at the 120th street address, the Millenders' address, and that he was living with his foster mother. Kelly also told Det. Messer. that she had been to the Millenders' house with Jerry Bowen prior to the assault. Det. Messer. wrote the 120th Street address information on the report during the interview with Ms. Kelly after she told him the suspect Bowen resided there. Det. Messer. also checked Bowen's DMV records which indicated that as of March 27, 2003, Mr. Bowen's address was the 120th Street address. Det. Messer. also checked Bowen's name on the Cal Gangs record which indicated that Bowen verbally told the Century deputies that his address as of May 17, 2003 was the [ER 21] 120th Street address. In addition, Det. Messer. went to the W. 97th location a week or two prior to the search and verified Bowen was not staying at that location. (UF #6-8.)

Defendants' expert, William P. Flynn, agrees that "any reasonable and prudent police officer with the same experience and training as Detective Messer. and, having the same knowledge and facts of the incident and investigation, would have reasonably concluded that the suspect resided at the 120th Street address." Flynn also found that "there is no reason why Detective Messer. should have disbelieved the victim inasmuch as she was in fear of her life and most assuredly would have wanted the suspect apprehended." (UF #20.)

The only other address that was a possibility for Bowen to be residing was the 97th Street address where the assault occurred. Kelly gave Det. Messer. a citation that had Bowen's license plate number to the motorcycle he was using. Det. Messer. does not remember if the address on the citation was the 97th Street address. However, even assuming, arguendo, that the citation showed the W. 97th Street location, if the citation had been issued within 45 days prior, it would have been obvious to Det. Messer. that Bowen did not reside there based upon Kelly's statement that he lived at the 120th Street address. If the citation had been issued more than 45 days prior, Det. Messer. could not have concluded that Bowen resided there based on the information Kelly had given him, and could not have so stated in a sworn affidavit. It was reasonable for Det. Messer. to conclude that if Bowen did in fact return to Kelly's 97th Street residence, his purpose would have been to harm her, not reside there. Defendants' expert Flynn agrees that "any reasonable and prudent police officer with the same experience and training as Detective Det. Messer. and, having the same knowledge and facts of the incident and investigation, would have reached the same reasonable conclusion" that Bowen did not reside at the 97th Street address. (UF #12.)

The warrant affidavit was reviewed and approved by Sergeant Lawrence, the team sergeant at Lennox Operation Safe Streets, Lieutenant Ornales, and DDA Janet Wilson (UF #21.) Because the warrant was supported by probable cause, there was no

[ER 22] constitutional violation. Any mistakes of fact or law made by Det. Messer. and by Lawrence were reasonable, entitling defendants to qualified immunity.

b. **Det. Messer. Did Not Mislead the Magistrate.**

Plaintiffs claim that Det. Messer. misled the magistrate by concealing material facts (Complaint, ¶11) in violation of due process under the Fourteenth Amendment (Count 2). A plaintiff alleging judicial deception by obtaining a warrant through false information "can only survive summary judgment on a defense claim of qualified immunity if the plaintiff can both establish a substantial showing of a deliberate falsehood or reckless disregard [for truth] and establish that, without the dishonestly included or omitted information, the magistrate would not have issued the warrant." *Hervey v. Estes*, 65 F.3d 784, 789 (9th Cir. 1995). Everything Det. Messer. wrote on the warrant affidavit was truthful and accurate based on his investigation of the facts in this case. Defendants' expert Flynn agrees that Det. Messer.'s Affiant Statement and Statement of Probable Cause were complete and accurate. (UF #21,22.) As plaintiffs cannot demonstrate a substantial showing of deliberate falsehood or reckless disregard for the truth, Messer. is entitled to summary judgment based on qualified immunity.

c. **Decision to Deploy SWAT Team and Night Service.**

Plaintiffs assert that the warrant did not justify night time service. (Complaint, ¶13.) Det. Messer. requested the SEB SWAT team's Blue Team, under team leader Sgt. Walker, to assist with the warrant service at the 120th Street location. Messer. also requested that the search warrant be endorsed for night service due to the fact that the investigation had shown that the primary suspect in this case had gang ties to the Mona Park Crip gang based on information provided by Ms. Kelly and the Cal-gang data base. In addition, the nature of the crime – assault with a deadly weapon – showed that night service would provide an added element of safety to the community, as well as for the deputy personnel serving the warrant, based on the element of surprise. Defendants' expert, Michael W. Odle, agrees that this decision to utilize the S.E.B. SWAT team for the warrant service was prudent and comports with SWAT deployment criteria [ER 23] recognized throughout the law enforcement and tactical community. (UF #23,24.) *See, also, Holland v. Harrington*, 268 F.3d 1179, 1190 (10th Cir. 2001) (merely deploying the SWAT team was not an unreasonable seizure which raises constitutional problems). No constitutional violation arose from deploying SWAT or the nighttime service.

## 4. ALL DEFENDANTS ARE ENTITLED TO QUALIFIED IMMUNITY ON THE *UNREASONABLE* SEARCH AND SEIZURE CLAIM.

### a. The Defendants Reasonably Relied on the Valid Warrant.

Plaintiffs assert that on November 6, 2003, Defendants illegally searched plaintiffs' residence and illegally seized property. (Complaint, ¶16.)

Under California law, "a search warrant is an order in writing, in the name of the people, signed by a magistrate, directed to a peace officer, commanding him or her to search for a person or persons, a thing or things, or personal property, and, in the case of a thing or things or personal property, bring the same before the magistrate." *People v. Ulloa*, 101 Cal.App.4th 1000, 1007 (2002).

Here, Det. Messer. conducted an advance briefing with the LASD SEB SWAT team, and reviewed the history of the incident, the suspect's record, and the photographs of the 120th Street location. The SWAT team reviewed the warrant, warrant preparation check list, and operations plan, outlining the basic facts of the search warrant. Det. Messer. informed the members of the SWAT team that a magistrate had reviewed and signed the warrant. (UF #29.) Under the circumstances, the officers had no reason to question the search warrant reviewed by a Deputy District Attorney, and signed by a magistrate and presented to them at the team briefing, because, as courts have noted, "when the right of privacy must reasonably

yield to the right of search is, as a rule, to be decided by a judicial officer." *Henderson v. City of Simi Valley*, 305 F.3d 1052, 1058 (9th Cir. 2002). Here, there was enough information so that objectively reasonable officers were entitled to rely on the magistrate judge's determination. *United States v. Clark*, 31 F.3d 831, 835 (9th Cir. 1994). Officers should not be placed in the position of constantly trying to 'second guess' the validity or legality of a warrant when directed [ER 24] by a magistrate to search: "Fourth Amendment rules "'ought to be expressed in terms that are readily applicable by the police in the context of the law enforcement activities in which they are necessarily engaged'" and not "'qualified by all sorts of ifs, ands, and buts.'" *Atwater v. City of Lagovista*, 121 S.Ct. 1536, 1553-1554 (2001). Defendants' expert, William P. Flynn, found that Det. Messer.'s Affiant Statement and Statement of Probable Cause were a "complete and accurate representation of Detective Det. [sic] Messer.'s experience and facts of the case." (UF #20, 22.) The deputies, therefore, reasonably relied on the warrant signed by the magistrate, and are entitled to qualified immunity.

That nine months later, a court granted a motion to quash the search warrant in the prosecution of Willie Millender (not a plaintiff to this action) does not invalidate the officers' reasonable understanding after reviewing the warrant signed by a magistrate. The Warrant indicated that Det. Messer. conducted an extensive background search on the suspect by utilizing departmental records, state computer records,

and other police agency records and it had been determined that the suspect lived at the 120th Street location. Given this information, the officers preparing to execute the warrant could have no reasonable expectation that a court would later grant a motion to quash the search warrant on the basis that Det. Messer. had failed to specify which departmental records he searched. (See Reporter's Transcript, 8-9-04 pg. 75:6-28, Exhibit GG.)

b. **Defendants Complied with Knock and Announce Notice.**

Plaintiffs assert that on November 6, 2003, the defendants failed to comply with knock and announce requirements. (Complaint, ¶¶15,20.)

The United States Supreme Court has declared: "[T]he common-law knock and announce principle forms a part of the Fourth Amendment reasonableness inquiry." *Wilson v. Arkansas*, 514 U.S. 927, 930 (1995). However, officers may forcibly enter a premises to execute a search warrant after knocking and announcing the authority and purpose. *See U.S. v. Reilly*, 224 F.3d 986, 991 (9th Cir. 2000), and 18 U.S.C. § 3109. Similarly, Penal Code § 1531 provides: "The officer may break open any outer or inner [ER 25] door or window of a house, or any part of a house, or anything therein, to execute the warrant, if after notice of his authority and purpose, he is refused admittance . . . an unreasonable delay in responding to a knock and announce is tantamount to a refused

admittance." *People v. Hoag*, 83 Cal.App.4th 1198, 1207 (2000).

Here, the defendants complied with the applicable statute by giving knock notice. The SWAT team personnel provided knock-notice both verbally and by way of a prerecorded announcement via a public address system. After the occupants failed to comply with the notice, defendants made a forcible entry after waiting a reasonable time and determining that they needed to make an entry. No one was injured and minimal property damage was sustained. The length of time between the knock/notice and entry was reasonable because Lt. Walker received information that there was a light on and movement in the house. It could have been Bowen and, given his violent history, no deputy would take a chance of being fired upon. Defendants' expert, Michael W. Odle, agrees that the SWAT team personnel provided knock notice and the tactics employed them were prudent and comport with tactics used in the tactical community. (SS #41.)

The reasonableness of the period of time between the knock/notice and entry is dependent upon the circumstances of the case. *See, e.g., United States v. Chavez-Miranda*, 306 F.3d 973, 980 (9th Cir. 2002). Knowledge of any facts from which an officer could infer that entry into a residence would pose any risk greater than the ordinary danger of executing a search warrant on a private residence is relevant to the reasonableness inquiry. *See Chavez-Miranda*, 306 F.3d at 981-82; *United States v. Roots*, 52 Fed. Appx.

12, 13-14 (9th Cir. 2002). Here, approximately 20 seconds elapsed from the time Walker asked for the announcements to be started on the tape, to the time when they actually gained entrance into the residence after porting the window and breaking the door. (UF #40.) *See States v. Phelps*, 490 F.2d 644, 646-47 (9th Cir. 1974) (10-20 second wait permissible); *United States v. Allende*, 486 F.2d 1351 (9th Cir. 1973) (approving 10-second interval before forceful entry in exigent circumstances).

Here, a twenty second wait was reasonable as a matter of law given the exigent [ER 26] circumstances – the fact that containment could see a light on and movement at the back of the house, and Walker inferred from this remark that somebody was up and moving, potentially Jerry Bowen. Given the suspect's violent history, a 20-second interval before forceful entry in these exigent circumstances was reasonable.

**c. <u>Defendants' Detention of Plaintiffs Was Reasonable.</u>**

Plaintiffs assert that defendants illegally detained plaintiffs. (Complaint, ¶19.) However, police officers executing a search warrant at a house need no independent reasonable suspicion in order to question or handcuff occupants during the search. *Muehler v. Mena*, 544 U.S. 93 (2005). *Mena* held that "officers executing a search warrant for contraband have the authority 'to detain the occupants of the premises while a proper search is conducted.' . . .

Such detentions are appropriate, we explained, because the character of the additional intrusion caused by detention is slight and because the justifications for detention are substantial. We made clear that the detention of an occupant is 'surely less intrusive than the search itself,' and the presence of a warrant assures that a neutral magistrate has determined that probable cause exists to search the home." *Id.* at 98, citing *Michigan v. Summers*, 452 U.S. 692 (1981).

Here, the SWAT members had a judicially approved warrant who determined that probable cause existed to search the home. Thus, defendants had the authority "to detain the occupants of the premises while a proper search" was conducted. Thus, "in *Summers,* the Supreme Court found that the defendant "was not free to leave the premises *while the officers were searching his home,*" and that his *detention constituted a seizure, albeit a reasonable one* under the Fourth Amendment. Id. at 696, 101 S.Ct. 2587. . . . the reasonable and necessary steps that the officers took to secure Kim's store during the search may preclude a conclusion that she was unconstitutionally seized . . . " *United States v. Kim*, 292 F.3d 969, 976-977 (9th Cir. 2002). Here, the plaintiffs were temporarily restrained for officer safety while the officers secured the premises. They testified the deputies were courteous, plaintiffs were allowed to sit in patrol cars, and the deputies provided them with blankets. (UF #47, 55, 66-70). Defendants' expert Odle [ER 27] found that the tactics used during the entry and

search were prudent and comport with tactics used throughout the tactical community. (UF #71.) There is no evidence of any illegal detention.

**d. No Wrongful or Unreasonable Destruction of Property**

Plaintiffs assert that Defendants unreasonably interfered with their personal property. (Complaint, ¶17.) The Supreme Court has held that "officers executing a search warrant occasionally 'must damage property in order to perform their duty.'" *Dalia v. United States*, 441 U.S. 238, 258 (1979). Therefore, the destruction of property during a search does *not necessarily* violate the Fourth Amendment. *United States v. Becker*, 929 F.2d 442, 446 (9th Cir.1991). Rather, "only unnecessarily destructive behavior, beyond that necessary to execute a warrant effectively, violates the Fourth Amendment." *Mena v. City of Simi Valley*, 226 F.3d 1031, 1041 (9th Cir. 2000). *See, also, Customer Co. v. City of Sacramento*, 10 Cal. 4th 368, 383-385 (1995) (where property damage was caused by city police officers using tear gas and mace to subdue and apprehend a felon, city's actions constituted an exercise of its police powers which required no compensation under the just compensation clause.) There is no evidence that the deputies used unnecessarily destructive behavior to execute the warrant.

e. **No Evidence Supports Plaintiffs' Claim of Conspiracy.**

Plaintiffs assert that Defendants conspired to deprive them of their Fourth Amendments [sic] rights. (Count 1.) The conspiracy claim fails as there is no evidence of an underlying constitutional violation.

## 5. THE ENTRY TEAM IS ENTITLED TO QUALIFIED IMMUNITY.

### a. Qualified Immunity re Reas. Expectation of Valid Warrant.

The Ninth Circuit addressed the issue that "reasonable mistakes can be made" in the context of search and seizure: "The Government is not required to demonstrate that an officer conducting a reasonable seizure *did not err* in carrying out his or her duties. In *Illinois v. Rodriguez*, 497 U.S. 177, 185-86 (1990), the Supreme Court stated this principle: It is apparent that in order to satisfy the "reasonableness" requirement of the [ER 28] Fourth Amendment, what is generally demanded of the many factual determinations that must regularly be made by agents of the government . . . is not that they always be correct, but that they always be reasonable. As we put it in *Brinegar v. United States*, 338 U.S. 160, 176, 69 S.Ct. 1302, 93 L.Ed. 1879 (1949): "Because many situations which confront officers in the course of executing their duties are more or less ambiguous, *room must be allowed for some mistakes* on their part." *U.S. v. Hawkins*, 249 F.3d 867, 875 (9th Cir. 2001).

Here, the team members were briefed about the history of the incident, the suspect's record, and the photographs of the 120th Street location. Walker reviewed the Search Warrant and supporting Affidavit before the search and made sure the Team knew what was in the warrant. Walker also saw on the front page of the Search Warrant that a Deputy District Attorney had reviewed and approved the warrant before the Judge reviewed and signed the warrant. Therefore, Walker believed they were serving a valid search warrant and so informed the SEB deputies involved in the warrant service. (UF #29.) Under the circumstances, the deputies had no reason to question the search warrant signed by a magistrate and presented to them at the team briefing. Thus, the deputies *acted reasonably* on the basis of the information provided, and could have no expectation that a court would later grant a motion to quash the search warrant on the basis that Det. Messer. had failed to specify which departmental records he searched.

In the context of their law enforcement activities, officers should not be engaged in all sorts of "ifs, ands, and buts." This is especially so in the context of team assignments for executing a search warrant: "Law enforcement officers are entitled to qualified immunity if they act reasonably under the circumstances, *even if the actions result in a constitutional violation*. . . . What's reasonable for a particular officer depends on his role in the search. Because searches often 'require[ ]cooperation and division of labor,' . . . officers' roles can vary widely. Typically, only one or a

few officers plan and lead a search, but more – perhaps many more – help execute it." *Ramirez v. Butte-Silver Bow County*, 298 F.3d 1022, 1027 (9th Cir. 2002) (citations omitted).

[ER 29] With respect to team leaders, the Court in *Butte-Silver Bow County* continued: "The presence of errors in a warrant does not automatically deprive search leaders of immunity. The question is whether the defects are such that they would have been noticed by a reasonably careful officer who read the warrant before executing it. Cf. Arnsberg v. United States, 757 F.2d 971, 981 (9th Cir. 1985) (holding that a search conducted pursuant to a facially flawed warrant did not violate the Fourth Amendment because 'the discrepancy [was] not a serious one')." *Ramirez, supra*, at 1028.

"A warrant also provides the detached scrutiny of a neutral magistrate, and thus ensures an objective determination whether an intrusion is justified in any given case." *People v. King*, 82 Cal.App.4th 1363, 1373 (2000). Here, the Warrant, signed by a neutral magistrate, specified that Messer. conducted an extensive background search on the suspect and determined that the suspect lived at the 120th Street location. The warrant appeared valid on its face as to the place specified, and items to be searched, and was signed by a judicial officer. The deputies acted reasonably on the basis of the information provided in the warrant and affidavits.

**b. Qualified Immunity re Conduct of Deputies During Search and Seizure Including Excessive Force Claim.**

The defendants serving the warrant are entitled to summary judgment on the basis of qualified immunity because, even though the law is clearly established regarding search and seizure, the conduct of the officers during the search involved no constitutional violation. No gun shots were fired and no one was injured. Defendants' limited use of their guns, i.e. briefly pointing the gun in the direction of the plaintiffs as they stepped out the door, was "reasonably necessary" and did not constitute excessive force. Balancing "the nature and quality of the intrusion on [plaintiffs'] Fourth Amendment interests against the countervailing governmental interests at stake," Defendants' seizure of plaintiffs was reasonable. *Graham v. Connor*, 490 U.S. 386, 396 (1989) (citations and internal quotation marks omitted). Walker's conduct in pointing his gun in the direction of the plaintiffs as they stepped out the door was not extreme or [ER 30] excessive. (UF #43, 44.) Bowen was wanted for assault with a deadly weapon and was known to routinely carry a sawed off shotgun. Some of the Millender family members were active Mona Park Crip gang members. Rector pointed his weapon in the direction of and to the side of Augusta and Brenda Millender. (UF #43.) Given the violent history of the suspect, the brief pointing of the guns was reasonable, and did not constitute excessive force.

As to handcuffing, Johnson admitted in his deposition that the deputy did not use unnecessary force while he was handcuffing him. (UF #66.) *See Muehler v. Mena, supra*, 544 U.S. 93 (Fourth Amendment not violated by detention in handcuffs of house's occupants during entire warrant-authorized search of house).

As to plaintiffs' claim that defendants required plaintiffs to leave their home at night in the cold, plaintiffs testified the deputies were courteous, plaintiffs were allowed to sit in patrol cars, and the deputies provided them with blankets. (UF #47, 55, 66-70). Michael Odle found that the tactics used during the entry and search were prudent and comport with tactics used throughout the tactical community. (UF #71.)

Odle has opined that in the actual execution of the search and arrest warrant service, the SWAT team personnel achieved their stated "Mission" and formulated and implemented an appropriate tactical "Plan" because the planning phase and tactics chosen for entry were responsible, prudent and comport with planning operations and tactics used throughout the tactical community. (UF #33.) There is no evidence that in the actual execution of the search and arrest warrant service, the deputies violated the plaintiffs' constitutional rights. Defendants are therefore entitled to qualified immunity.

c. **Qualified Immunity re Items Seized.**

Plaintiffs assert that the warrant was overbroad because it did not describe the items to be seized with

sufficient particularity. (Complaint, ¶14.) Plaintiffs also assert the warrant authorized the seizure of articles without probable cause to believe such items were likely to be found in the Millenders' home or had been used to commit a felony. However, "[a]n affidavit providing more guidance than an overbroad warrant [ER 31] may cure the warrant's overbreadth" if "(1) the warrant expressly incorporated the affidavit by reference and (2) the affidavit either is attached physically to the warrant or at least accompanies the warrant while agents execute the search." *United States v. Bridges*, 344 F.3d 1010, 1018 (9th Cir. 2003). Here, Attachment 2 of the Warrant specifically sets out the items to be seized [weapons and evidence showing gang affiliation itemized in UF #25].

The warrant affidavit stated that Messer. believed the items sought would be in Bowen's possession and the recovery of the weapon could be invaluable in the successful prosecution of the suspect, and the curtailment of further crimes being committed. (UF #25-26.) Valid warrants commonly allow police to search for "firearms and ammunition" as well as documents and effects which tend to show possession, occupancy, ownership and/or control over the residence to be searched. *See United States v. McLaughlin*, 851 F.2d 283, 286 (9th Cir. 1988) ("A search warrant may be used, not only to gather evidence of a criminal activity, but also to gather evidence of who controlled the premises suspected of connection with criminal acts."); *United States v. Crozier*, 777 F.2d 1376, 1380-81 (9th Cir. 1985) (upholding warrant authorizing seizure of

items that indicate control or ownership of the premises searched). Here, any caliber of shotgun or receipts would show possession of and/or purchase of guns. The photos sought re gang membership could be linked with other gang members, evidencing criminal activity. Thus, the warrant was not overbroad and the deputies' search and seizure of the items sought was objectively reasonable.

## 6. CONCLUSION.

Based on the foregoing, Defendants are entitled to summary judgment.

Dated: September 18, 2006

MANNING & MARDER
KASS, ELLROD, RAMIREZ LLP

By: /s/ [Illegible]
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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

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| AUGUSTA MILLENDER, BRENDA MILLENDER, WILLIAM JOHNSON,<br><br>Plaintiff [sic],<br><br>vs.<br><br>COUNTY OF LOS ANGELES, LOS ANGELES COUNTY SHERIFF'S | Case No.<br>CV 05-2298 DDP (RZx)<br><br>**DEFENDANTS' OPPOSITION TO PLAINTIFFS' STATEMENT OF UNCONTROVERTED MATERIAL FACTS AND CONCLUSIONS OF LAW** |

DEPARTMENT, LEROY BACA; et al.

Defendants.

(Filed Oct. 2, 2006)

**Date: October 23, 2006**
**Time: 10:00 a.m.**
**Courtroom: "3"**

Defendants COUNTY OF LOS ANGELES, LOS ANGELES COUNTY SHERIFF'S DEPARTMENT, SHERIFF LEROY BACA, SCOTT WALKER, RICK RECTOR, DONALD NICHIPORUK, RICHARD SCHLEGEL, (erroneously sued as M. SCHLEGEL), DEPUTY BRICE STELLA (erroneously sued as D. STELLA), JACK DEMELLO, (erroneously sued as J. DERNELLO), DAVID O'SULLIVAN, JAMES RITENOUR, IAN STADE, ROBERT J. LAWRENCE, and CURT MESSERSCHMIDT, [ER 1112] hereby submit their Opposition to plaintiffs' Statement of Uncontroverted Material Facts and Conclusions of Law.

Dated:
October 2, 2006

MANNING & MARDER
KASS, ELLROD, RAMIREZ LLP

By: /s/ [Illegible]
Eugene P. Ramirez
Attorneys for Defendants
COUNTY OF LOS ANGELES, LOS ANGELES COUNTY SHERIFF'S DEPARTMENT, SHERIFF LEROY BACA, SCOTT WALKER, RICK RECTOR, DONALD NICHIPORUK, RICHARD SCHLEGEL, DEPUTY BRICE STELLA, JACK DEMELLO, DAVID O'SULLIVAN, JAMES RITENOUR, IAN STADE, ROBERT J. LAWRENCE and CURT MESSERSCHMIDT

| [ER 1113] **PLAINTIFFS' FACTS:** | **DEFENDANTS' RESPONSES:** |
| --- | --- |
| 1. Augusta Millender (Mrs. Millender), who on November 6, 2003, was 73 years old, was being treated for diabetes and high blood pressure. She also had metal pins in her femur and used a walker. Ex U (Mrs. Millender 84:21-85:1) | 1. Defendants' Response: Undisputed for purposes of summary judgment but irrelevant. |
| 2. On November 6,2003 Mrs. Millender was living with her 47 year old daughter, Brenda, who was also being treated for high blood pressure, and also insulin-dependent diabetes. Ex EE (Brenda interrogatory responses, no. 1) | 2. Defendants' Response: Undisputed for purposes of summary judgment but irrelevant. |
| 3. On November 6, 2003 Mrs. Millender's grandson, William-Johnson, who was Brenda's son, also live at their house. He was 20 years old at the time. Ex W (William 49:18-25) | 3. Defendants' Response: Undisputed for purposes of summary judgment but irrelevant. |

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| 4. The Millenders lived at 2234 East 120th Street, Los Angeles, California. (No cite) | 4. Defendants' Response: Objection. Plaintiffs fail to identify supporting evidence. Without waiving this objection, Defendants respond as [ER 1114] follows: Undisputed for purposes of summary judgment but irrelevant. |
| 5. In 1982, Mrs. Millender met for the first time, her foster son Jerry Bowen, who was 13 years old. He lived with her until he was about 19 years old, which would have been 1987 or 1989. Ex U (Mrs. Millender 81 :4-16); Ex FF (Mrs. Millender interrogatory response, no. 18) | 5. Defendants' Response: Undisputed for purposes of summary judgment but irrelevant. This fact does not raise a triable issue. The information obtained by Det. Messer. demonstrated a fair probability that the suspect Bowen was in fact residing at his foster mother's house at the 120th Street address: Ms. Kelly told Det. Messer. that Bowen was not staying with her on the 97th Street address, but that he was staying at the 120th street address, the Millenders' address, and that he was living with his foster mother. Kelly also told Det. Messer. that she had been to the Millenders' house with Jerry Bowen prior to the assault. Det. Messer. |

wrote the 120th Street address information on the report during the interview with Ms. Kelly after she told him the suspect Bowen resided there. Det. Messer. also checked Bowen's DMV records which indicated that as of March 27, 2003, Mr. Bowen's address was the 120th [ER 1115] Street address. Det. Messer. also checked Bowen's name on the Cal Gangs record which indicated that Bowen verbally told the Century deputies that his address as of May 17, 2003 was the 120th Street address. In addition, Det. Messer. went to the W. 97th location a week or two prior to the search and verified Bowen was not staying at that location. (Defendants' UF #6-8.)

Defendants' expert, William P. Flynn, agrees that "any reasonable and prudent police officer with the same experience and training as Detective Det. Messer. and, having the

same knowledge and facts of the incident and investigation, would have reasonably concluded that the suspect resided at the 120th Street address." Flynn also found that "there is no reason why Detective Det. Messer. should have disbelieved the victim inasmuch as she was in fear of her life and most assuredly would have wanted the suspect apprehended." (Defendants' UF #20.)

[ER 1116] The only other address that was a possibility for Bowen to be residing was the 97th Street address where the assault occurred. Kelly gave Det. Messer. a citation that had Bowen's license plate number to the motorcycle he was using. Det. Messer. does not remember if the address on the citation was the 97th Street address. However, even assuming, arguendo, that the citation showed the W. 97th Street location, if the citation had been issued

within 45 days prior, it would have been obvious to Det. Messer. that Bowen did not reside there based upon Kelly's statement that he lived at the 120th Street address. If the citation had been issued more than 45 days prior, Det. Messer. could not have concluded that Bowen resided there based on the information Kelly had given him, and could not have so stated in a sworn affidavit. It was reasonable for Det. Messer. to conclude that if Bowen did in fact return to Kelly's 97th Street residence, his purpose would have been to harm her, not reside there. Defendants' [ER 1117] expert Flynn agrees that "any reasonable and prudent police officer with the same experience and training as Detective Det. Messer. and, having the same knowledge and facts of the incident and investigation, would have reached the same reasonable conclusion" that

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| | Bowen did not reside at the 97th Street address. (Defendants' UF #12.)<br><br>The warrant affidavit was reviewed and approved by Sergeant Lawrence, the team sergeant at Lennox Operation Safe Streets, Lieutenant Ornales, and DDA Janet Wilson (Defendants' UF #21.) Because the warrant was supported by probable cause, there was no constitutional violation. Any mistakes of fact or law made by Det. Messer. and by Lawrence were reasonable, entitling defendants to qualified immunity. |
| 6. The next time Bowen stayed at Mrs. Millender's home was from February to March of 2003, when he stayed there only temporarily. Ex FF (Mrs. Millender interrogatory response, no. [ER 1118] 19) | 6. Defendants' Response: Undisputed for purposes of summary judgment but irrelevant. Defendants incorporate herein by reference their response to No. 5 above. |
| 7. When Bowen stayed at the house in 2003, he stayed in a separate back house, not in the main house. Ex U (Mrs. | 7. Defendants' Response: Undisputed for purposes of summary judgment but irrelevant. Defendants incorporate herein by |

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| Millender 24: 3-7, 94:22-23) | reference their response to No. 5 above. |
| 8. Because at that time Bowen did not have a regular address, Mrs. Millender allowed him to use her address to accept mail from the State of California, from whom he had applied for disability. Ex U (Mrs. Millender 89:7-11, 90:19-91:23, 92:25-93:5) | 8. Defendants' Response: Undisputed for purposes of summary judgment but irrelevant. Defendants incorporate herein by reference their response to No. 5 above. |
| 9. Shelly Kelly lived at 1425 97th Street, Los Angeles. Ex C (videotaped interview and transcript 3:5-15) | 9. Defendants' Response: Defendants object to the transcript of videotaped interview as lacking foundation. The transcription was not made by a certified court reporter, lacks foundation, and therefore is inadmissible. Without waiving this objection, the portion of the transcript cited by plaintiffs does not support this fact. |
| 10. Bowen lived at the 97th Street [ER 1119] address with Kelly. Ex C (videotaped interview and transcript 4:21 (had his own keys), 5:21-28) (sic) (threatened to hurt her is (sic) she left him); | 10. Defendants' Response: Defendants object to the transcript of videotaped interview as lacking foundation. The transcription was not made by a certified court reporter, lacks foundation, and therefore |

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| Ex S (felony complaint for spousal/cohabitant); Ex G (DMV record). | is inadmissible. Without waiving this objection, the portion of the transcript cited by plaintiffs does not support this fact. On page 4, line, 17, of the transcript, Kelly states Bowen was just visiting her at that location. |
| 11. On October 17, 2003, while Kelly was moving out of their apartment, Bowen arrived and assaulted her. Ex C (videotaped interview and transcript 7:5-8:16) | 11. Defendants' Response: Defendants object to the transcript of videotaped interview as lacking foundation. The transcription was not made by a certified court reporter, lacks foundation, and therefore is inadmissible. Without waiving this objection, Defendants respond as follows: Undisputed for purposes of summary judgment that on October 17, 2003, Bowen assaulted Kelly. |
| 12. Kelly managed to get away from Bowen and as she drove away in her car, Bowen shot at her car with a black sawed-off shotgun with a pistol grip. [ER 1120] Ex C (videotaped interview and transcript 7:5-8:16) | 12. Defendants' Response: Defendants object to the transcript of videotaped interview as lacking foundation. The transcription was not made by a certified court reporter, lacks foundation, and therefore is inadmissible. |

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| | Without waiving this objection, Defendants respond as follows: Undisputed. |
| 13. Bowen kept belongings at the 97th Street address, including the gun he used to shoot at Kelly. Ex C (videotaped interview and transcript 8:3-7) | 13. Defendants' Response: Defendants object to the transcript of videotaped interview as lacking foundation. The transcription was not made by a certified court reporter, lacks foundation, and therefore is inadmissible. Without waiving this objection, the portion of the transcript cited by plaintiffs does not support this fact. |
| 14. Curt Messerschmidt was the detective assigned to the case, and he eventually authored a search warrant affidavit. Ex J (warrant affidavit); Ex X (Messerschmidt 21 : 19-21 ) | 14. Defendants' Response: Undisputed. |
| 15. During her interview, Kelly told Messerschmidt that "if she wasn't mistaken," she [thought] Bowen was "hiding out" at the Millenders' house, which was his foster mother's house. [ER 1121] Ex C | 15. Defendants' Response: Defendants object to the transcript of videotaped interview as lacking foundation. The transcription was not made by a certified court reporter, lacks foundation, and therefore is inadmissible. Without |

(videotape interview and transcript 19:10-17)

waiving this objection, Defendants respond as follows: Undisputed.

16. Messerschmidt did not ask and Kelly did not tell him why she believed this to be true, and therefore this information is not in Messerschmidt's warrant affidavit. Ex C (videotape interview and transcript (entirety)); Ex J (warrant affidavit); Ex X (Messerschmidt 50:10-15 (he didn't ask and Kelly didn't say why she thought Bowen living at the Millenders'), 50:16-20 (he didn't ask and Kelly didn't say if she'd seen Bowen at the Millenders' since the assault), 50:21-25 (he didn't ask and Kelly didn't say if she'd been to the Millenders' since the assault), 51:1-5 (he didn't ask and Kelly didn't say if she'd called Bowen on the phone at the Millenders' since the incident), 51:6-10 (he didn't ask and Kelly didn't say where she got

16. Defendants' Response: Defendants object to the transcript of videotaped interview as lacking foundation. The transcription was not made by a certified court reporter, lacks foundation, and therefore is inadmissible. Without waiving this objection, Defendants respond as follows: Disputed in part. Kelly told Messer. by telephone that she had gone to the Millenders' house with Bowen prior to the assault. Messer depo.: 51:23-52:9, plaintiffs' Exhibit X. The rest of the fact is undisputed. However, this does not raise a triable issue. The information obtained by Det. Messer. demonstrated a fair probability that the suspect Bowen was in fact residing at his foster mother's house at the 120th Street address: Ms. Kelly told Det. Messer. that Bowen was not staying with her on the 97th

her information that Bowen was at the Millenders'), 51:11-12 (Kelly didn't say that someone told [ER 1122] her Bowen was at the Millenders'), 51: 13-17 (he didn't ask and Kelly didn't say the last time she knew for a fact Bowen was at the Millenders'), 51:18-20 (he didn't ask Kelly when was the last time she saw Bowen at the Millenders'), 52:21-53:1 (he didn't ask and Kelly didn't say when was the last time she called Bowen on the phone at the Millenders'), 53 :2-6 (he didn't ask and Kelly didn't say when was the last time she picked up Bowen from the Millenders'), 53:7-11 (he didn't ask and Kelly didn't say the last time Bowen told her he was living at the Millenders').

Street address, but that he was staying at the 120th street address, the Millenders' address, and that he was living with his foster mother. Kelly also told Det. Messer. that she had been to the Millenders' house with Jerry Bowen prior to the assault. Det. Messer. wrote the 120th Street address information on the report during the interview with Ms. Kelly after she told him the suspect Bowen resided there. Det. Messer. also checked Bowen's DMV records which indicated that as of March 27, 2003, Mr. Bowen's address was the 120th Street address. Det. Messer. also checked Bowen's name on the Cal Gangs record which indicated that Bowen verbally told the Century deputies that his address as of May 17, 2003 was the 120th Street address. In addition, Det. Messer. went to the W. 97th location a week or two prior to the search and verified Bowen

was not staying at that location. (Defendants' UF #6-8.)

Defendants' expert, William P. Flynn, agrees that "any reasonable and prudent police officer with the same experience and training as Detective [ER 1123] Det. Messer. and, having the same knowledge and facts of the incident and investigation, would have reasonably concluded that the suspect resided at the 120th Street address." Flynn also found that "there is no reason why Detective Det. Messer. should have disbelieved the victim inasmuch as she was in fear of her life and most assuredly would have wanted the suspect apprehended." (Defendants' UF #20.)

The only other address that was a possibility for Bowen to be residing was the 97th Street address where the assault occurred. Kelly gave Det. Messer. a citation that had Bowen's

license plate number to the motorcycle he was using. Det. Messer. does not remember if the address on the citation was the 97th Street address. However, even assuming, arguendo, that the citation showed the W. 97th Street location, if the citation had been issued within 45 days prior, it would have been obvious to Det. Messer. that Bowen did not reside there based upon Kelly's statement that he lived at the [ER 1124] 120th Street address. If the citation had been issued more than 45 days prior, Det. Messer. could not have concluded that Bowen resided there based on the information Kelly had given him, and could not have so stated in a sworn affidavit. It was reasonable for Det. Messer. to conclude that if Bowen did in fact return to Kelly's 97th Street residence, his purpose would have been to harm her, not reside there. Defendants' expert Flynn

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| | agrees that "any reasonable and prudent police officer with the same experience and training as Detective Det. Messer. and, having the same knowledge and facts of the incident and investigation, would have reached the same reasonable conclusion" that Bowen did not reside at the 97th Street address. (Defendants' UF #12.)<br><br>The warrant affidavit was reviewed and approved by Sergeant Lawrence, the team sergeant at Lennox Operation Safe Streets, Lieutenant Ornales, and DDA Janet Wilson (Defendants' UF #21.) Because the warrant was supported by probable [ER 1125] cause, there was no constitutional violation. Any mistakes of fact or law made by Det. Messer. and by Lawrence were reasonable, entitling defendants to qualified immunity. |
| 17. Messerschmidt did not ask and Kelly did | 17. Objection: Defendants object to fact as phrased. |

not tell him on what was she basing her belief, and therefore this information is not in Messerschmidt's warrant affidavit. See No. 16, above.

Defendants cannot admit or deny this fact as it is vague and ambiguous. "Kelly did not tell him on what was she basing her belief" is vague and ambiguous because plaintiffs do not specify belief about what? Without waiving the objection, Defendants incorporate their response to No. 5 above.

18. Although Kelly allegedly told Messerschmidt that she went to the Millenders' house with Bowen some unspecified time before the assault, he did not document it,. and it is not in his affidavit. Ex X (Messerschmidt 51:21-52:20).

18. Defendants' Response: Undisputed. However, this does not raise a triable issue. The information obtained by Det. Messer. demonstrated a fair probability that the suspect Bowen was in fact residing at his foster mother's house at the 120th Street address: Ms. Kelly told Det. Messer. that Bowen was not staying with her on the 97th Street address, but that he was staying at the 120th street address, the [ER 1126] Millenders' address, and that he was living with his foster mother. Kelly also told Det. Messer. that she had been to the Millenders' house with

Jerry Bowen prior to the assault. Det. Messer. wrote the 120th Street address information on the report during the interview with Ms. Kelly after she told him the suspect Bowen resided there. Det. Messer. also checked Bowen's DMV records which indicated that as of March 27, 2003, Mr. Bowen's address was the 120th Street address. Det. Messer. also checked Bowen's name on the Cal Gangs record which indicated that Bowen verbally told the Century deputies that his address as of May 17, 2003 was the 120th Street address. In addition, Det. Messer. went to the W. 97th location a week or two prior to the search and verified Bowen was not staying at that location. (Defendants' UF #6-8.)

Defendants' expert, William P. Flynn, agrees that "any reasonable and prudent police officer with the same experience and training as Detective [ER

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| | 1127] Det. Messer. and, having the same knowledge and facts of the incident and investigation, would have reasonably concluded that the suspect resided at the 120th Street address." Flynn also found that "there is no reason why Detective Det. Messer. should have disbelieved the victim inasmuch as she was in fear of her life and most assuredly would have wanted the suspect apprehended." (Defendants' UF #20.)<br><br>The only other address that was a possibility for Bowen to be residing was the 97th Street address where the assault occurred. |
| 19. Kelly did not tell Messerschmidt Bowen's residence address. Ex X (Messerschmidt 117:21-118:4) | 19. Defendants' Response: Objection. Mischaracterizes testimony. Messer. testified that Kelly did not use the term "residence." Messer. depo.: 118:1-4, plaintiffs Exhibit X. Plaintiffs place undue emphasis on Det. Messer.'s understanding of the words "reside" or "residence." |

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| | Whether Bowen in fact "resided" at the 120th Street location is not determinative of whether there was a fair probability [ER 1128] that Bowen would be found at the Millender's home. Plaintiffs' focus on "residence" is unavailing, as Det. Messer. was using that term in a layman's manner. As recognized by the Supreme Court, "affidavits 'are normally drafted by nonlawyers in the midst and haste of a criminal investigation. Technical requirements of elaborate specificity once exacted under common law pleadings have no proper place in this area." *Illinois v. Gates*, 462 U.S. 213, 235 (1983). The point is that Det. Messer. thought there was enough information (a "fair probability") to believe Bowen would be found at this location. |
| 20. Kelly did not tell Messerschmidt where Bowen was currently residing. Ex X (Messerschmidt 117:21-118:4); | 20. Defendants' Response: Objection. Mischaracterizes testimony. Kelly did not use the term residence." Messer. depo.: 118:1-4, |

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| Ex C (videotape interview and transcript 19:10-17) | plaintiffs Exhibit X. Plaintiffs place undue emphasis on Det. Messer.'s understanding of the words "reside" or "residence." Whether Bowen in fact "resided" at the 120th Street location is [ER 1129] not determinative of whether there was a fair probability that Bowen would be found at the Millender's home. Plaintiffs' focus on "residence" is unavailing, as Det. Messer. was using that term in a layman's manner. As recognized by the Supreme Court, "affidavits 'are normally drafted by nonlawyers in the midst and haste of a criminal investigation. Technical requirements of elaborate specificity once exacted under common law pleadings have no proper place in this area." *Illinois, supra,* 462 U.S. at 235. The point is that Det. Messer. thought there was enough information (a "fair probability") to believe Bowen would be found at this location. |

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| 21. Kelly did not tell Messerschmidt where Bowen was currently living. Ex X (Messerschmidt 117:21-118 :4); Ex C (videotape interview and transcript 19: 1 0-1 7) | 21. Defendants' Response: Defendants object to the transcript of videotaped interview as lacking foundation. The transcription was not made by a certified court reporter, lacks foundation, and therefore is inadmissible. Without waiving this objection, defendants respond as [ER 1130] follows: Objection. Mischaracterizes transcript in which Kelly states Bowen was hiding out the Millenders house. |
| 22. Kelly was a drug dealer for 18 years, but had been clean for several years before the incident with Bowen. Ex C (videotape interview and transcript 24:26-27) | 22. Defendants' Response: Defendants object to the transcript of videotaped interview as lacking foundation. The transcription was not made by a certified court reporter, lacks foundation, and therefore is inadmissible. Without waiving this objection, defendants respond as follows: Objection. Mischaracterizes transcript in which Kelly states she has been clean for 8 years. In any event, this fact is irrelevant. Any reasonable and prudent police officer with the same experience |

and training as Detective Det. Messer. and, having the same knowledge and facts of the incident and investigation, would view Kelly as a reliable source. She was Bowen's girlfriend, and the victim of a potentially deadly crime. On the video tape, it is apparent that she wants him caught, she is willing to testify, and even went as far as locating another witness to give a statement to [ER 1131] Messerschmidt.

23. According-to his affidavit, Messerschmidt then searched "departmental records, state computer records and other police agency records" to verify Bowen's address. The affidavit does not state with any specificity what databases Messerschmidt searched or what the records revealed. Ex J (affidavit); Ex T (8/9/04 Reporter's Transcript 75:17-26)

23. Defendants' Response: Undisputed. However, this does not raise a triable issue. The fact that nine months later, a court granted a motion to quash the search warrant in the prosecution of Willie Millender (not a plaintiff to this action) does not invalidate the officers' reasonable understanding after reviewing the warrant signed by a magistrate. The Warrant indicated that Det. Messer. conducted an extensive background search on the

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| | suspect by utilizing departmental records, state computer records, and other police agency records and it had been determined that the suspect lived at the 120th Street location. Given this information, the officers preparing to execute the warrant could have no reasonable expectation that a court would later grant a motion to quash the search warrant on the basis that Det. Messer. had failed to specify which departmental records he searched. (See Reporter's Transcript, 8-9-04 pg. 75:6- [ER 1132] 28, Defendants' Exhibit GG.) |
| 24. Based upon the computer searches Messerschmidt conducted, the 97th Street address was the most current, not the 120th Street address. Ex X (Messerschmidt 63:13-64:1); Ex G Gang Profile, DMV, CLETS and CCHRS printouts) | 24. Defendants' Response: Undisputed but irrelevant. Both the 97th Street Address and the 120th Street address were shown to be Bowen's address within months of each other. Although the DMV records indicated that as of 9/3/03, Mr. Bowen's address was the 97th Street address, the DMV records also indicated that |

as of 3/27/03 Bowen's address was the 120th Street address. The 120th Street address was much more believable as his current address because Ms. Kelly had just told Messer. that was his address. Also, it did not make any sense to Messer. that Bowen would remain living at a location in which he had committed an assault with a deadly weapon which the police had investigated. Messer. had a good basis for believing that the 120th Street address was where Bowen was currently living since Kelly had told him Bowen was staying at the 120th Street address with his foster mother. In addition, Messer. checked [ER 1133] Bowen's name on the Cal Gangs record. Bowen's name on the Gang Member Subject File Report indicates that Bowen verbally told the Century deputies that his address as of May 17, 2003 was the 120th Street address. On November 3,

2003, Messer. searched the County Warrant System, and spoke with Sgt. Carey at Century OSS to see if he was familiar with this location. Carey was familiar with the house and it was known to the station as a problem house. (Defendants' UF #18.) Messer. also found out Bowen was on summary probation for spousal battery and driving on an unlicensed driver charge. (Defendants' UF #19.)

Expert Flynn found that "any reasonable and prudent police officer with the same experience and training as Det. Messer. and, having the same knowledge and facts of the incident and investigation, would have reasonably concluded that the suspect resided at the 120th Street address." Flynn found "there is no reason why Detective Det. Messer. should have disbelieved the victim inasmuch as she was in fear of [ER 1134] her life and most assuredly would have

wanted the suspect apprehended." (Defendants' UF #20.)

25. The Department of Motor Vehicles records Messerschmidt searched indicated the most recent address for Bowen, as of 9/3/03, was the 97th Street address, not the 120th Street address. Ex G (DMV record); Ex X (Messerschmidt 60: 18-61:14)

25. Defendants' Response: Undisputed but irrelevant. Defendants incorporate herein by reference their response to No. 24 above.

26. According to the DMV records, Bowen had not been associated with the 120th Street address since 3/27/03.

26. Defendants' Response: Undisputed but irrelevant. Defendants incorporate herein by reference their response to No. 24 above.

27. The Gang Profile Records showed Bowen was associated with the 120th Street address on 5/16/03, but that information was less reliable because it was based on the statements of the arrestee, not official information. Ex X (Messerschmidt 60:5-17); Ex G (Gang Profile Records (SEB0096))

27. Defendants' Response: Objection. Plaintiffs' counsel's non-expert opinion that the information given by Bowen was not reliable is irrelevant and does not raise a triable issue. Defendants incorporate herein by reference their response to No. 24 above.

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| [ER 1135] 28. According to a restraining order issued 5/16/03, Bowen's address at that time was on Marvin Street. Ex G (11/3/03 CLETS printout (SEB0090) | 28. Defendants' Response: Undisputed but irrelevant. Defendants incorporate herein by reference their response to No. 24 above. |
| 29. The computer records Messerschmidt searched did not indicate Bowen's current residence address. Ex G (Gang Profile, DMV, CLETS & CCHRS printouts); Ex X (Messerschmidt 63: 14-64:1) | 29. Defendants' Response: Disputed but irrelevant. Defendants incorporate herein by reference their response to No. 24 above. |
| 30. If Messerschmidt had any further information bearing on Bowen's whereabouts, he did not include it in the warrant affidavit. Ex J (affidavit); Ex X (Messerschmidt 52:5-20, 116:18-117:5) | 30. Objection: Defendants object to fact as phrased. Defendants cannot admit or deny this fact as it is vague and ambiguous. "If Messerschmidt had any further information . . . " is vague and ambiguous because plaintiffs do not specify further than what? Without waiving the objection, Defendants incorporate their responses to Nos. 5 and 24 above. |
| 31. In the two days before the search warrant execution, members of the Special Enforcement | 31. Defendants' Response: Undisputed that on November 4, 2003, two days before the service of the |

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| Bureau, Special [ER 1136] Weapons Team, who would be executing the search warrant, went to the Millenders' home sometime between 10 am and 1 pm. Ex Y (Walker 104:8-105:8); Ex Z (Rector 26:22-24, 31:11-33:9); Ex BB (Nichiporuk 28:16-32:12) | warrant, Walker, Rector, Nichiporuk, Stella and Stade took photographs and looked at the area in order to determine how they were going to serve the warrant. (Defendants' UF #35.) Undisputed that on November 5, 2003, Walker and Stella drove around the area of the Millender to arrest Bowen if they happened to see him. Rector and Nichiporuk assisted them in a separate car. Stella and Walker contacted 4-5 male blacks who were shooting dice on the sidewalk directly in front of the Millender home. A couple of the males matched the general description of Bowen – black male, five-ten to six feet tall, around 200 pounds, early thirties. The deputies determined that the males did not live there. (Defendants' UF #36.) |
| 32. The deputies approached the house in broad daylight without their weapons drawn. | 32. Defendants incorporate their response to No. 31 above. |

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| 33. Two SWT deputies spoke with Mrs. Millender and Brenda on their driveway. Ex Y (Walker 104:8-105:8, [ER 1137] 106:4-6, 116: 5-11), Ex BB (Nichiporuk 28:18-29:5, 37:15-17), Ex Z (Rector 26:22-24, 31:3-5), Ex AA (Stella 27:9-12) | 33. Defendants incorporate their response to No. 31 above. |
| 34. The SEB deputies who were at the Millenders' house the day before the search warrant execution did not document what occurred there and did not tell Messerschmidt anything about it. Ex Y (Walker 118:2-4, 119:19-21); Ex AA (Stella 40:11-13); Ex Z (Rector 36:22-37:5); Ex_BB (Nichiporuk 38:3-5, 39:20-24); Ex X (Messerschmidt 78:18-79:25) | 34. Defendants' response: Disputed. The drive-bys were documented with photographs. Walker depo.: 118:5-8, plaintiffs' Exhibit Y; Stella depo.:39:24-50:4, plaintiffs' Exhibit AA. |
| 35. Messerschmidt had no specific information that Bowen posed a danger to officers. Ex X (Messerschmidt 120:11-18) | 35. Defendants' Response: Objection. Mischaracterizes testimony. Messer. testified that he was not told that Bowen threatened to shoot any police officers who came to his house with a search warrant. |

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| | Messer. depo.:120:15-18, plaintiffs' Exhibit X. This does not raise a triable issue. Bowen was a known Mona Park Crip gang member, had a record of violence, presented a three-strike risk, and had reportedly fired a sawed off shot gun at [ER 1138] his girlfriend. |
| 36. After the unproductive search of the Millenders' home., Messerschmidt, without SWT assistance, arrested Bowen in the middle of the day hiding under a bed in a motel room occupied by Bowen and his wife, after knocking, and being admitted by Bowen's wife. Ex R (11/19/03 report); Ex X (Messerschmidt 130:12-132:5) | 36. Defendants' Response: Undisputed for purposes of summary judgment but irrelevant. This does not raise a triable issue of fact. The subsequent arrest of Bowen in a motel room has no bearing on whether Defendants acted reasonably at the time of the Nov. 6 search. The only relevant inquiry is whether, at the time the affidavit was written, nighttime service was justified. Bowen's violent history and the nature of his crime – assault with a deadly weapon – demonstrated the need for night service. (Even if the court were to consider what happened subsequent to the November 6 search, |

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| | the two situations are not the same. Entry into a motel room is much less dangerous than into a house, i.e., it is a much smaller area with fewer places to hide out.) Entry into a motel room is much less dangerous than into a house, i.e., it is a much smaller area with much fewer areas to hide out.) |
| [ER 1139] 37. Messerschmidt applied for and obtained his warrant on November 4. 3x J (Warrant) | 37. Defendants' Response: Undisputed. |
| 38. Messerschmidt sought, and the warrant authorized, nighttime service. Ex J (Warrant) | 38. Defendants' Response: Undisputed. |
| 39. The warrant authorized the seizure of any and all firearms, and anything related to any firearm. Ex J (warrant) | 39. Defendants' Response: Mischaracterizes description in warrant. The warrant authorized "All handguns, rifles, or shotguns of any caliber, or any firearms capable of firing ammunition, or firearms or devices modified or designed to allow it to fire ammunition. All caliber of ammunition, miscellaneous gun parts, gun |

cleaning kits, holsters which could hold or have held any caliber handgun being sought. Any receipts or paperwork, showing the purchase, ownership, or possession of the handguns being sought. Any firearm for which there is no proof of ownership. Any firearm capable of firing or chambered to fire any caliber ammunition." "Articles of evidence showing street gang membership or [ER 1140] affiliation with any Street gang to include but not limited to any reference to "Mona Park Crips", including writings or graffiti depicting gang membership, activity or identity. Articles of personal property tending to establish the identity of person in control of the premise or premises. Any photographs or photograph albums depicting persons, vehicle, weapons or locations, which may appear relevant to gang membership, or which may depict the item being sought and or believed to

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| | be evidence in the case being investigated on this warrant, or which may depict evidence of criminal activity. Additionally to include any gang indicia that would establish the persons being sought in this warrant, affiliation or membership with the "Mona Park Crips" street gang. |
| 40. Messerschmidt had no reason to believe that any firearm other than the black sawed-off shotgun with a pistol [ER 1141] grip used in Bowen's crime was contraband or evidence of any crime, or lawfully seizable. Ex C (Videotape interview and transcript 8:3-16, 11:1-12:1, 23:27-24:3); Ex I (photograph of Bowen with gun) | 40. Defendants' Response: Defendants object to the transcript of videotaped interview as lacking foundation. The transcription was not made by a certified court reporter, lacks foundation, and therefore is inadmissible. Without waiving this objection, Defendants respond as follows: Plaintiffs' assertion that the warrant authorized the seizure of articles without probable cause to believe such items were likely to be found in the Millenders' home or had been used to commit a felony is without merit. An affidavit pr ing more guidance tha overbroad warrant |

cure the warrant's overbreadth" if "(1) the warrant expressly incorporated the affidavit by reference and (2) the affidavit either is attached physically to the warrant or at least accompanies the warrant while agents execute the search." *United States v. Bridges*, 344 F.3d 1010, 1018 (9th Cir. 2003). Here, Attachment 2 of the Warrant specifically sets out the items to be seized. The warrant affidavit stated that Messer. believed the items sought in the warrant would be in Bowen's possession and the recovery of the weapon could be [ER 1142] invaluable in the successful prosecution of the suspect, and the curtailment of further crimes being committed. (Defendants' UF #25-26.) Valid warrants commonly allow police to search for "firearms and ammunition" as well as documents and effects which tend to show possession, occupancy, ownership and/or

control over the residence to be searched. *See United States v. McLaughlin,* 851 F.2d 283, 286 (9th Cir. 1988) ("A search warrant may be used, not only to gather evidence of a criminal activity, but also to gather evidence of who controlled the premises suspected of connection with criminal acts."); *United States v. Crozier,* 777 F.2d 1376, 1380-81 (9th Cir. 1985) (upholding warrant authorizing seizure of items that indicate control or ownership of the premises searched). Here, any caliber of shotgun or receipts would show possession of and/or purchase of guns. The photos sought re gang membership could be linked with other gang members, evidencing criminal activity. The photos sought re gang membership [ER 1143] could be linked with other gang members, evidencing criminal activity as gang affiliation is an enhancement to criminal charges. Thus, the warrant was not

overbroad and the deputies' search and seizure of the items sought was objectively reasonable.

41. The warrant authorized the seizure of any and all "gang" paraphernalia. Ex J (Warrant)

41. Defendants' Response: Mischaracterizes description in warrant. The warrant authorized "Articles of evidence showing street gang membership or affiliation with any Street gang to include but not limited to any reference to "Mona Park Crips", including writings or graffiti depicting gang membership, activity or identity. Articles of personal property tending to establish the identity of person in control of the premise or premises. Any photographs or photograph albums depicting persons, vehicle, weapons or locations, which may appear relevant to gang membership, or which may depict the item being sought and or believed to be evidence in the case being investigated on this warrant, or which may depict [ER 1144] evidence of criminal activity. Additionally to

include any gang indicia that would establish the persons being sought in this warrant, affiliation or membership with the "Mona Park Crips" street gang.

42. Messerschmidt had no reason to believe Bowen's crime was in any way connected with any "gang." Ex X (Messerschmidt 119:9-120:10)

42. Defendants incorporate herein by reference their response to No. 40 above. The photos sought re gang membership could be linked with other gang members, evidencing criminal activity as gang affiliation is an enhancement to criminal charges.

43. The warrant authorized the seizure of any article of personal property tending to establish the identity of the person in control of the house. Ex J (warrant)

43. Defendants' Response: Mischaracterizes description in warrant. The warrant authorized: "Articles of personal property tending to establish the identity of person in control of the premise or premises."

44. Messerschmidt knew or should have known that Mrs. Millender was the person in control of her home and that articles of personal property tending to establish the identity of the [ER 1145]

44. Defendants incorporate herein by reference their response to No. 40 above.

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| person in control of the home were not contraband nor evidence of a crime, nor lawfully seizable. Ex X Messerschmidt 128:21-129:4); Ex C videotape interview and transcript 3:23-24, 19:17-19) | |
| 45. The warrant authorized the seizure of any photographs which might depict any, undefined, criminal activity. Ex J (warrant) | 45. Defendants' Response: Mischaracterizes description in warrant. The warrant authorized "Any photographs or photograph albums depicting persons, vehicle, weapons or locations, which may appear relevant to gang membership, or which may depict the item being sought and or believed to be evidence in the case being investigated on this warrant, or which may depict evidence of criminal activity. Additionally to include any gang indicia that would establish the persons being sought in this warrant, affiliation or membership with the "Mona Park Crips" street gang." |

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| 46. Messerschmidt had no reason to believe that photographs depicting criminal activity, whether defined or undefined, would be found in Mrs. [ER 1146] Millender's home. Ex J (Warrant affidavit) | 46. Defendants incorporate herein by reference their response to No. 40 above. |
| 47. On November 6, 2003 at about 5:00 a.m., deputies executed the search warrant. Ex M (11/6/03 report by Stella) | 47. Defendants' Response: Undisputed. |
| 48. Mrs. Millender, Brenda and William were asleep when the deputies arrived at their home. Ex U (Mrs. Millender 12:15-17); Ex V (Brenda 31:17-20); Ex W (William 9:21-10:1) | 48. Defendants' Response: Undisputed. |
| 49. Defendants began playing a prerecorded announcement from a radio car parked in the street, which was more than 100 feet away from the front door. Ex M (11/6/03 report by Stella); Ex E (photos from street); Ex D (aerial photos); Ex F | 49. Defendants' Response: Undisputed that defendants played a prerecorded announcement over the public address system from one of the tactical vehicles that the SWAT team uses. Disputed as to number of feet from the front door. Walker testified that the front door |

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| (Los Angeles County Assessor's Map, etc.). | was approximately 60 feet from the street. Walker depo.:51:2-6, plaintiffs' Exhibit Y. However, the exact number of feet does not create a triable issue as to whether Defendants' complied with the [ER 1147] knock/notice requirements. |
| 50. The pre-recorded announcement was unintelligible at the Millenders' front porch. Ex L (audio of entry) | 50. Defendants' Response: Defendants object to the portion of the transcript made by plaintiffs' attorney as lacking foundation. The partial transcription was not made by a certified court reporter, lacks foundation, and therefore is inadmissible. Without waiving this objection, Defendants responds as follows: Disputed that the pre-recorded announcement was unintelligible. |
| 51. During the first word of the prerecorded announcement, deputies began breaking into the Millenders' home by breaking down the front door. Ex L (audio of entry); Ex M (Stella's 11/6/03 report) | 51. Defendants' Response: Defendants object to the portion of the transcript made by plaintiffs' attorney as lacking foundation. The partial transcription was not made by a certified court reporter, lacks foundation, and therefore |

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| | is inadmissible. Without waiving this objection, Defendants respond as follows: Disputed that during the first word of the prerecorded announcement, defendants began breaking down the front door. See Walker Decl., ¶¶13-14. |
| [ER 1148] 52. After breaking down the front door and smashing the picture window, the deputies on the porch said, "Sheriff's Department, open the door, we have a search warrant." Ex L (audio of entry) | 52. Defendants' Response: Defendants object to the portion of the transcript made by plaintiffs' attorney as lacking foundation. The partial transcription was not made by a certified court reporter, lacks foundation, and therefore is inadmissible. Without waiving this objection, Defendants respond as follows: Disputed. See Walker Decl., ¶¶13-14. |
| 53. Within three seconds of the beginning of the pre-recorded announcement, deputies smashed a large living room picture window. Ex L (audio of entry) | 53. Defendants' Response: Defendants object to the portion of the transcript made by plaintiffs' attorney as lacking foundation. The partial transcription was not made by a certified court reporter, lacks foundation, and therefore is inadmissible. Without |

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| | waiving this objection, Defendants respond as follows: Disputed. See Walker Decl., ¶14. |
| 54. The deputies did not afford the Millenders any chance to open the door. Ex L (audio and entry) | 54. Defendants' Response: Defendants object to the portion of the transcript made by plaintiffs' attorney [ER 1149] as lacking foundation. The partial transcription was not made by a certified court reporter, lacks foundation, and therefore is inadmissible. Without waiving this objection, Defendants respond as follows: Disputed. See Walker Decl., ¶¶13-14. |
| 55. Upon entering the house, deputies encountered Mrs. Millender, Brenda and William, who all followed the deputies instructions and went outside to wait. Ex Y (Walker 59:18-60:12) | 55. Defendants' Response: Undisputed. |
| 56. The deputies proceeded to search and clear the house, which took approximately 20 minutes. Ex Y(Walker 83:12-16, 84:4-7, 90:2-9, 91: 16-19), Ex AA (Stella | 56. Defendants' Response: Undisputed. |

79:4-11, 82:28-83:2, 86:11-12, 86:23-87:6, 88:1-18); Ex Z (Rector 73:23-25, 75:13-14, 76:5-7, 79:2-4, 79:19-20, 80:7-14, 85:110); Ex BB (Nichiporuk 69:6-15, 72:1773: 1, 73 :21-25, 74:21-75:21)

57. The deputies then went to back [ER 1150] house, where Mrs. Millender's adult sons resided. Ex M (11/6/03 report by Stella)

57. Defendants' Response: Undisputed.

58. The deputies did not forcibly enter the back house. Ex Y (Walker 90:2-92:9)

58. Defendants' Response: Undisputed.

59. At back house, the deputies made announcements and waited a few minutes for the occupants to get dressed and come out, which they all did without incident. Ex Y (Walker 60:13-17, 90:2-92:9)

59. Defendants' Response: Undisputed.

60. Bowen was not found at the location. Ex K (Team Activation Packet SEB 0012)

60. Defendants' Response: Undisputed.

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| 61. Bowen's black, sawed-off shotgun was not found at the location. Ex P (11/6/06 receipt for seized property) | 61. Defendants' Response: Undisputed. |
| 62. Mrs. Millender, Brenda and [ER 1151] William were forced to wait outside for approximately two hours, some of the time being allowed to sit inside patrol cars. Ex W (William 23:25-24:3 (outside in police car for 2 to 2 ½ hours), 32:21-23 (in living room 45 minutes before they removed his handcuffs)); Ex U (Mrs. Millender 47:4-10 (stood outside near flower bed for 30 minutes), 54:10-18 (was sitting in police car for about 2 hours), 58:24-59:24 (after waiting in car, officers brought everyone into the living room), 58:10-23 (police were there a long time); Ex V (Brenda 58:23-59:5 (deputies were there for a total of four | 62. Defendants' Response: Defendants object to use of the word "forced." Plaintiffs testified that the deputies were courteous to them. While Augusta Millender was standing outside the house, nobody pointed a gun at her and nobody pointed a gun at her while she was in the police car. (Defendants' UF #68.) The deputies did not call her names, or yell at her, or touch her. The deputies were not rude to her or the occupants of the house. Johnson testified the deputies were courteous to him and turned on the heat for him. Brenda does not remember the officers being rude to her during the incident. (Defendants' UF #69.) Augusta testified that none of the people in the house told Augusta they were physically abused by any of the police officers. |

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| | (Defendants' UF #70.) Defendants' expert Odle found that the tactics used during the entry and search were prudent and comport with tactics used throughout the tactical community. (Defendants' UF #71.) Undisputed. |
| 63. While outside, Mrs. Millender told [ER 1152] the deputies she needed to use the restroom. Because the deputies would not allow her back into the house, Mrs. Millender was forced to relieve herself in the street. Ex U (Mrs. Millender 51:12-21,52:13-16); Ex X (Messerschmidt 18:2-17) | 63. Defendants' Response: Undisputed that Augusta Millender relieved herself in the street. Object to the term "forced to." |
| 64. When the Millenders were allowed back into their house, they were then made to sit in the living room for an additional 45 minutes while the deputies completed searching the house. Ex W (William 32:21-23 (in living room 45 minutes before they removed his handcuffs)); | 64. Defendants' Response: Undisputed that Defendants maintained security on the Millenders until the location was cleared by SEB. Disputed as to four hours. See Messer. Decl., ¶34 ("I estimate we were there for two hours in total"). |

Ex U (Mrs. Millender 8:24-59:24 (after waiting in car, officers brought everyone into the living room), 58:10-23 (police were there a long time); Ex V (Brenda 58:23-59:5 (deputies were there for a total of four hours))

65. William Johnson was handcuffed the entire time. Ex W (William 32:21-23 (in living room 45 minutes before they removed his handcuffs)

65. Defendants' Response: Disputed. Willie Johnson testified that he asked the deputy if he could get the handcuffs off his hands, that he needed to be at [ER 1153] work within an hour or so. The deputies said they would try to get him out of there within the hour. The deputies eventually took the handcuffs off Johnson. (Defendants' UF #67.)

66. The deputies seized Mrs. Millenders personal shotgun, which was not suspected of being used to commit any crime. Ex P (11/6/03 Receipt for Seized Property)

66. Defendants' Response: Undisputed that a Mossberg 12 gauge shotgun was recovered from the search of the 120th Street residence. Defendants incorporate herein by reference their response to No. 40 above.

67. One of the occupants of the back house was Mrs. Millender's son, Willie Millender, who was arrested for being under the influence. Ex N (11/6/03 Report by Messerschmidt)

67. Defendants' Response: Undisputed but irrelevant.

68. Criminal charges were filed against Willie Millender in *People v. Millender,* case number 3CM09209 in the California Superior Court of the South Central Judicial District of the County of Los Angeles. Ex T (8/9/04 Reporter's Transcript)

68. Defendants' Response: Undisputed but irrelevant.

[ER 1154] 69. Mr. Millender, represented by a public defender, made a motion to suppress based upon lack of probable cause in Messerschmidt's warrant affidavit. Ex T (8/9/04 Reporter's Transcript)

69. Defendants' Response: Undisputed but irrelevant.

70. The court granted Mr. Millender's motion to quash the warrant on the grounds that the affidavit did not establish probable cause to

70. Defendants' Response: Undisputed but irrelevant.

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| believe Bowen would be found at the plaintiffs' home. The case was dismissed and not refiled. Ex T (8-;9104 Reporter) s transcript, 75:6-77:14) | |
| 71. The Sheriffs Department serves as the investigative arm for the district attorney. Ex X (Messerschmidt 138:19-139:6) | 71. Defendants' Response: Objection. Mischaracterizes Messer's testimony. Messer. merely testified that he was the investigator on the case. Messer. depo.: 139:5-6, plaintiffs' Exhibit X. |
| 72. Messerschmidt testified under oath in the hearing on Mr. Millender's [ER 1155] motion to suppress. Ex X (Messerschmidt 138:15-18); Ex T (8/9/04 Reporter's Transcript) | 72. Defendants' Response: Undisputed |
| 73. The district attorney vigorously litigated the validity of the search warrant. Ex T (8/9/04 Reporter's Transcript 3-7, 15:24,23:3,24:8,29:8-31:17, 32:24-27, 35:8-12,39:13, 40:11,41:8,46:8-13, 47:4-15,48:17-28,62:6-65:26, 72:18-73:27) Ex T (8/9/04 Reporter's Transcript) | 73. Defendants' Response: Objection. Plaintiffs' counsel's opinion that the district attorney vigorously litigated the validity of the search warrant is an opinion, not a fact, and is irrelevant. |

74. The hearing transcript is 80 pages, and includes direct and redirect examination of the People's witness, Messerschmidt, as well as cross examination of both Mrs. Millender and Brenda, and a closing argument.

74. Defendants' Response: Undisputed but irrelevant.

75. Defendants' actions were in accordance with the customs, policies and actions were in accordance with the practices of the County and Sheriff s Department. Ex T (Messerschmidt 140:15-24) (his training the [ER 1156] Department gave him and no one told him it wasn't); Ex Y (Walker 137:19-140:25) (same); Ex Z (Rector 98:5-99:17) (same); Ex AA (Stella 94:20-97:2) (same); Ex BB (Nichiporuk 85:10-87:21) (same); Ex X (Messerschmidt 30:25-32:1 ) (before submitting his affidavit to the court, it was reviewed and approved by his supervisors); Ex CC (Maxwell 36:15-37:5,51:17-53:11,

75. Defendants' Response: Objection. Defendants cannot admit or deny this fact as plaintiffs fail to identify what policy or custom they are referring to. Plaintiffs' argument that the individual defendants admitted their actions were in accordance with Department policy does not prove a *Monell* claim since plaintiffs cannot prove a County policy caused a violation of federal constitutional rights. Performing an act in accordance with a County policy which did ***not*** violate plaintiffs' constitutional rights precludes the imposition of liability under *Monell.* The actions of the individual defendants were objectively reasonable and

55:10-25, 81:13-21, 128:12-129:3) (Lt. Maxwell, the incident commander, approved everything from the initial assignment of SWT to break in.), 37:23-39:13 (Evans, the Special Enforcement Bureau SWT commander, Lieutenant Evans also reviewed defendants' reports and the entry audiotape. )

did not deprive plaintiffs of their constitutional rights. In the absence of a constitutional violation, plaintiffs' *Monell* claim fails.

Dated:
October 2, 2006

MANNING & MARDER
KASS, ELLROD, RAMIREZ LLP

By: /s/ [Illegible]
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COUNTY OF
LOS ANGELES, et al.

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

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| AUGUSTA MILLENDER, BRENDA MILLENDER, WILLIAM JOHNSON,<br>Plaintiffs,<br>vs.<br>COUNTY OF LOS ANGELES,<br>Defendants. | Case No. CV 05-2298 DDP (RZx)<br>**PLAINTIFFS' STATEMENT OF GENUINE ISSUES IN RESPONSE TO THE INDIVIDUAL DEFENDANTS' STATEMENT OF ALLEGED UNCONTROVERTED FACTS**<br>[October 2, 2006]<br>Date: 10/16/06<br>Time: 10:00 a.m.<br>Ctrm: 3 |

Plaintiffs Augusta Millender, Brenda Millender and William Johnson hereby respond to the Individual Defendants' Separate Statement of "Uncontroverted" Facts. Unless otherwise noted, all Exhibits A

through FF refer to those exhibits filed with plaintiffs' Motion for Summary Adjudication.

DATED: October 2, 2006

**ROBERT MANN**
**DONALD W. COOK**
Attorneys for Plaintiffs

By /s/ Donald W. Cook
Donald W. Cook

| [ER 1344] **DEFENDANTS' "UNCONTROVERTED" ACTS** [sic] **AND SUPPORTING EVIDENCE** | **PLAINTIFFS' GENUINE ISSUE AND SUPPORTING EVIDENCE** |
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| 1. On October 17, 2003, at 1425 W. 97th Street in Los Angeles ("97th Street location"), the suspect, Jerry Ray Bowen, had a physical confrontation with his former girlfriend, Shelly Kelly, in which he bit her, attempted to throw her from a second story balcony, and eventually fired at her with a sawed-off shotgun as she fled the scene. Declaration of Curt Alan Messerschmidt (Messer. Decl."), ¶¶1-4, 5-6; Incident Report re assault with a deadly weapon by | 1. Objection: hearsay. Disputed. Bowen did not shoot at Kelly and possibly not even at Kelly's car. **Exhibit GG** (Odle 22:25-27:24); **Exhibit H** (photo of Kelly's car). Bowen tried to push Kelly down the stairs, not throw her over the balcony. **Exhibit C** (videotape and transcript 7:23). |

H. Garcia, Bates Stamp No. 0254-2056, Exhibit A; Supplemental Incident Report, Bates Stamp, No. 0257-0259, Exhibit B.

2. During the October 17, 2003 incident, Ms. Kelly called the Sheriff's Department to stand by while she moved her belongings out of the apartment she shared with Jerry Bowen. Ms. Kelly said that die [sic] to Mr. Bowen's violent temper and some previous physical [ER 1345] assaults on her by Mr. Bowen, she decided to break off the relationship and move out of the W. 97th location. Because of Mr. Bowen's violent nature, and Ms. Kelly being fearful for her safety, she contacted Lennox Sheriff's Station and requested deputies to watch over her while she gathered some of her property from her residence at the 97th location. Upon the deputies' arrival, Ms. Kelly began

2. Objection: hearsay, compound, portions are irrelevant. Disputed. Kelly did not state the reason she decided to break up with Bowen. **Exhibit C** (videotape and transcript).

to retrieve her property and place it into her vehicle. Messer. Decl., ¶7; Incident Report re assault with a deadly weapon by H. Garcia, Bates Stamp No. 0254-2056, Exhibit A; Supplemental Incident Report, Bates Stamp, No. 0257-0259, Exhibit B.

3. Approximately twenty minutes after the deputies arrived, the deputies were assigned an emergency call of a child not breathing. The deputies advised Ms. Kelly that they had to leave, but would return after handling the call. Ms. Kelly stated that as soon as the deputies left the location, Mr. Bowen appeared at the bottom of the stairs and [ER 1346] stated, "I told you to never call the cops on me, bitch!" The suspect advanced up the stairs and grabbed the front of Ms. Kelly's shirt with both his hands. Ms. Kelly and Mr. Bowen became involved in a

3. Objection: hearsay, compound. Disputed. Bowen tried to push Kelly down the stairs, not throw her over the balcony. **Exhibit C** (videotape and transcript 7:23).

physical altercation, with Mr. Bowen attempting to throw Ms. Kelly over the top railing of the second story landing. Ms. Kelly, who was able to keep herself from being thrown over the railing, was grabbed again by Mr. Bowen, who proceeded to bite her on the rear right shoulder. Mr. Bowen also grabbed Ms. Kelly by the hair and attempted to drag her into the residence at the W. 97th location. Messer. Decl., ¶7a; Incident Report re assault with a deadly weapon by H. Garcia, Bates Stamp No. 0254-2056,Exhibit A; Supplemental Incident Report, Bates Stamp, No. 0257-0259, Exhibit B

4. Ms. Kelly, fearing for her personal safety, and to keep herself from being dragged into the location, sat down on the ground, and straddled the doorway with her legs. Mr. Bowen then grabbed [ER 1347] both

4. Objection: hearsay, compound

of her arms, at ehich [sic] time she was able to pull out of her shirt, and run to her vehicle. Within second, Mr. Bowen emerged from the location holding a black sawed off shotgun with a pistol grip and began running toward Ms. Kelly. Mr. Bowen ran to the front of Ms. Kelly's vehicle and pointed the shotgun at her, stating, "If you try to leave, I'll kill you, bitch!" Ms. Kelly leaned over in her seat and pushed the gas pedal all the way down. She saw Mr. Bowen jump out of the way of the vehicle and fire one round at her, damaging her vehicle. Ms. Kelly continued driving westbound 97th Street toward Halldale Avenue and could see Mr. Bowen chasing her on foot and firing the shotgun approximately four more times in her direction. Ms. Kelly was able to drive away and located police officers a short

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| time later. Messer. Decl., ¶8; Incident Report re assault with a deadly weapon by H. Garcia, Bates Stamp No. 0254-2056, Exhibit A; Supplemental Incident Report, Bates Stamp, No. 0257-0259, Exhibit B. | |
| [ER 1348] 5. While deputies were interviewing Ms. Kelly at her residence, they immediately recognized the victim and location, as the same individual and address they had left earlier. Ms. Kelly also provided four photographs of the suspect to aid the deputies in their investigation. Messer. Decl., ¶9; Incident Report re assault with a deadly weapon by H. Garcia, Bates Stamp No. 0254-2056, Exhibit A; Supplemental Incident Report, Bates Stamp, No. 0257-0259, Exhibit B. | 5. Objection: hearsay, compound, irrelevant. |
| 6. Det. Messer. was assigned to investigate the Bowen/Kelly assault case. Before meeting | 6. Undisputed. |

with Ms. Kelly, Messer. reviewed the incident report and a supplemental report prepared by Deputy Hector Garcia regarding the assault incident. Messer. Decl., ¶1-4, 6; Incident Report re assault with a deadly weapon by H. Garcia, Bates Stamp No. 0254-2056, Exhibit A; Supplemental Incident Report, Bates Stamp, No. 0257-0259, Exhibit B.

[ER 1349] 7. On October 22, 2003, Messer. spoke to the victim, Ms. Kelly, on the phone. Messer. checked Bowen's rap sheet/criminal history on the California Law Enforcement Teletype System ("CLETS") which indicated Bowen's violent history and multiple felony and misdemeanor arrests. Messer. Decl., ¶¶10, 11; DMV computer printout re Jerry Ray Bowen, Bates Stamp No. SEB0098-99, Exhibit F; Gang Member Subject File Report,

7. Objection: hearsay, Best Evidence Rule, no foundation, Harvey/Madden Rule (*People v. Harvey*, 156 Cal.App.2d 516 (1958); *People v. Madden*, 2 Cal.3d 1017 (1970)).

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| subject ID CA01-0000056886 re Jerry Bowen, Bates Stamp No. SEB 0092-00097, Exhibit G; Consolidated Criminal History Transcript (computed printout) re Jerry Bowen, Bates Stamp No. SEB0112-0129, Exhibit H. | |
| 8. Messer. met with Kelly at the Lennox Sheriff's station, reviewed the incident report, and verified the facts of the incident with her. Kelly told Messer. she believed Bowen was staying at or hiding out at the 120th Street address, with his foster mother, that Bowen was not staying with her on the 97th Street address, and that he was staying at the [ER 1350] 120th street address. Kelly told Messer. on the phone that she had been to the Millenders' house with Jerry Bowen prior to the assault. This was one more piece of information that led Messer. to believe that Bowen | 8. Objection. hearsay, Best Evidence Rule, no foundation, Harvey/Madden Rule (*People v. Harvey,* 156 Cal.App.2d 516 (1958); *People v. Madden,* 2 Cal.3d 1017 (1970)). Irrelevant as to what Kelly allegedly told Messerschmidt on the phone, and that he allegedly checked out the 97th Street address because those things were not documented and it is not in the affidavit; and Disputed that it actually happened. **Ex J** (affidavit); **Ex X** (Messerschmidt 52:5-20, 116:18-117:5), 30:3-6 (was trained that all information bearing on probable cause must be included in the affidavit). |

could be at the 120th street address. Kelly also stated she had been told by her neighbors that Bowen had been seen coming back to the 1425 W. 97th Street address. Messer. went to the 97th location a week or two prior to the search warrant and verified that Bowen was not staying at that location. Messer Decl., ¶12; 10-22-03 videotaped interview of victim, Exhibit O.

9. In Messer.'s training, police offices [sic] are taught that the successful use of informants is critical in developing accurate information pertaining to a case. Police officers are taught that informants are information providers who could be a citizen victim, witness, paid informant or a subject charged with a crime. In this case, the informant who provided information on where the suspect was residing was the victim, Kelly, who told Messer.

9. Disputed. Kelly did not tell Messerschmidt that Bowen was residing at the 120th Street address. **Ex C** (videotape interview and transcript 19:10-17); **Ex X** (Messerschmidt 117:21-118:4).

on two [ER 1351] occasions that the suspect was residing at the 120th Street address which she knew to be the suspect's foster mother's residence. Messer. wrote the 120th Street address information on the report during the interview with Kelly. Messer. Decl., ¶3; Incident Report re assault with a deadly weapon by H. Garcia, with handwritten 120th Street address, Bates Stamp No. 0254-2056, Exhibit J; Augusta depo.: 81:4-12, Exhibit L.

10. Augusta Millender testified that when Jerry Bowen was living at her residence between January and March of 2003, he received mail at her house from the County of Los Angeles, and that she saw Shelly Kelly at her house on at least two occasions. Augusta depo.: 90:19-24; Augusta depo.: 95:9-25, Exhibit L.

10. Undisputed that Mrs. Millender so testified, but irrelevant to the issue of whether there was probable case [sic] in the warrant. These facts were unknown to defendants before service of the warrant and were not included in the affidavit. **Ex J** (affidavit).

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| 11. The only other address that was a possibility for Bowen to be residing was the 97th Street address where the assault occurred. Messer. did not believe Bowen resided at the 97th Street address because Kelly had told him that Bowen [ER 1352] was living with his foster mother at the 120th Street address. Kelly gave Messer. a citation that had Bowen's license plate number to the motorcycle he was using. Messer. does not remember what the address on the citation was. Messer. Decl., ¶14. | 11. Objection: irrelevant as to Messerschmidt's subjective beliefs, misstates the evidence because whether Messerschmidt remembers the address or not, it's clear the citation did not contain the 120th Street address. **Ex C** (tape and transcript 19:5-13); *Graham v. Connor,* 490 U.S. 386, 396 (1989). Disputed. **Ex G** (11/3/03 CLETS printout showing Marvin address (SEB0090)); **Ex R** (11/19/03 report by Messerschmidt that when he asked Kelly again, she offered two additional addresses for Bowen; Messerschmidt Declaration attached to Defendants' motion, ¶38. |
| 12. Defendants' expert Flynn concludes that "any reasonable and prudent police officer with the same experience and training as Detective Messer. and having the same knowledge and facts of the incident and investigation, would have reached the same reasonable conclusion" that | 12. Objection: Although undisputed that Flynn reaches those conclusions, he is not qualified to opine about Messerschmidt's alleged beliefs or reasoning. It's pure speculation, and those beliefs and reasoning are irrelevant anyway. *Graham v. Connor,* 490 U.S. 386, 396 (1989). Improper expert opinion. |

Bowen did not reside at the 97th Street address. Even assuming the citation showed the W. 97th Street location if the citation had been issued within 45 days prior, it would have been obvious to Det. Messer. that Bowen dud [sic] not reside there based upon Kelly's statement that he loved [sic] a [sic] the 120th Street address. If the citation had been issued more than 45 days prior, Det. Messer. could not have [ER 1353] concluded that Bowen resided there based on the information Kelly had given him, and could not have so stated in a sworn affidavit. It was reasonable for Det. Messer. to conclude that if Bowen did in fact return to Kelly's 97th Street residence, his purpose would have been to hurt her, not to reside there. Defendants' expert Flynn concludes hat [sic] "any reasonable and prudent officers

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| with the same experience and training as Detective Messer. and, having the same knowledge and facts of the incident and investigation, would have reached the same reasonable conclusion" that Bowen did not reside at te [sic] 97th Street address. Declaration of Expert Witness William P. Flynn, pg.,4 ¶3, Exhibit M. | |
| 13. Messer. took photographs of the bruises and bite mark on Kelly. Messer. reviewed the incident report with Kelly to make sure the information was correct. Messer. also reviewed the photographs that Ms. Kelly had given the deputies that evening. Messer. Decl., ¶15. | 13. Objection. Hearsay, Best Evidence Rule. |
| 14. Kelly identified Bowen in a "six [ER 1354] pack" line up after signing the "Witness Admonition Mug Show Ups" form. Bowen was a known Mona Park Crip gang member. Messer. | 14. Objection. Hearsay, Best Evidence Rule, Speculation, no foundation, Harvey/Madden Rule (*People v. Harvey,* 156 Cal.App.2d 516 (1958); *People v. Madden,* 2 Cal.3d 1017 (1970)). |

Decl., ¶¶16-17; Los Angeles County Sheriff's Dept. Safe Streets Bureau, Operation Safe Streets, :ennox [sic] Sheriff's Station, Witness Admonition – Mug Show Ups – UPS, name: Shelly Kelly, dated 10/22/03, Bates Stamp No. SEB 0396-0397, Exhibit C.

15. On October 23, 2003, Messer. interviewed witness Gerry Floyd at the Lennox station. Floyd stated that he saw the suspect, Bowen, run up the stairs at the 97th Street location and grab Ms. Kelly by the bouse [sic] and hit her. Floyd stated that he saw a verbal altercation by the suspect followed by a physical altercation in which Bowen grabbed Kelly by the blouse. Floyd stated that Kelly broke loose from Bowen at which time Bowen went inside the house and came down the stairs with a gun. Floyd then saw Bowen fire two

15. Objection, hearsay, Best Evidence Rule.

rounds at Kelly from a 120guage sawed-off shotgun with a piston [sic] grip. Floyd then observed the [ER 1355] suspect chase Kelly as she drove away from the location. Floyd said that the landlady at the 97th Street address said she was going to put a new lock on the door. Floyd identified Bowen in a "six pack" line up after signing the "Witness Admonition Mug Show Ups" form. Messer. Decl., ¶¶18-19, Los Angeles County Shieriff's [sic] Dept. Safe Streets Bureau, Operation Safe Streets, Lennox Sheriff's Station, Witness Adminition [sic] – Mug Show Ups – UPS, name: Gerry Floyd, dated 10/23/03, Bates Stamp No. SEB 0398-0399, Exhibit D.

16. Messer. prepared a supplemental report regarding the interviews with Kelly and Floyd and began doing further research to verify if the

16. Undisputed.

120th Street address was a good address for Bowen. Messer. Decl., ¶20; County of L.A. Sheriff's Dept. Supplemental Report er: [sic] assault with a deadly weapon (firearm) 245(a)(2)P.C., file no. 403-10148-0371-051, Bates Stamp No. SEB-175-SEB0182, Exhibit I.

17. Messer. conducted an extensive background search on Bowen utilizing [ER 1356] departmental records, state computer records, and other police agency records. Based on this extensive search and information provided by Kelly, Messer. determined that Bowen resided at 2234 E. 120th Street, Los Angeles, California. Messer.'s determionation [sic] was based upon specific address information provided by Kelly. Kelly stated she had an ongoing dating relationship with Bowen for five to six months, and that he also had his

17. Objection. Vague as to the terms "extensive background search," hearsay, Messerschmidt's subjective beliefs or reasoning is irrelevant. *Graham v. Connor,* 490 U.S. 386, 396 (1989); Best Evidence Rule, Speculation, no foundation, Harvey/Madden Rule (*People v. Harvey,* 156 Cal.App.2d 516 (1958); *People v. Madden,* 2 Cal.3d 1017 (1970)).

own set of keys to her apartment on the 87th [sic] Street address. Kelly also said she had been over at the 120th Street address with Bowen prior to the assault. Kelly stated the 120th Street address was Bowen's foster mother's home. In addition, Messer. checked information about Bowen from DMV records, Cal-Gangs data entries and California criminal history records for Bowen. Messer. checked DMV records and Cal-gangs records to verify that the date of birth for Mr. Bowen matched. Messer. also checked Bowen's name on the National Criminal Index Center. Messer. Dec., ¶21; DMV computer [ER 1357] printout re Jerry Ray Bowen, Bates Stamp No. SEB0098-99, Exhibit F; Gang Member Subject File Report, subject ID CA01-0000056886 re Jerry Bowen, Bates

Stamp No. SEB 0092-00097, Exhibit G; Consolodated [sic] Criminal History Transcript (computer printout) re: Jerry Ray Bowen, Bates Stamp No. SEB0112-0129, Exhibit H.

18. Messer. conducted research to verify if the address on 120th Street was a good address for Bowen. Messer. did a computer search of records to verify Bowen's name, address and date of birth. Messer, checked the Consolidated Criminal History Reporting System ("CCHRS"). The CCHRS indicated that Bowen was on summary probation for spousal battery and driving on an unlicensed driver charge. Messer. also checked Bowen's DMV records. Although the DMV records indicated that as of 9/3/03, Mr. Bowen's address was the 97th Street address, the DMV records also indicated that as of 3/27/03 Bowen's address was the

18. Objection. Hearsay, Messerschmidt's subjective beliefs or reasoning is irrelevant. *Graham v. Connor,* 490 U.S. 386, 396 (1989); Best Evidence Rule, Speculation, no foundation, Harvey/Madden Rule *People v. Harvey,* 156 Cal.App.2d 516 (1958); *People v. Madden,* 2 Cal.3d 1017 (1970)).

120th Street address. The 120th Street address was [ER 1358] much more believable as his current address because Ms. Kelly had just told Messer. that was his address. Also, it did not make any sense to Messer. that Bowen would remain living at a location in which he had committed an assault with a deadly weapon which the police had investigated. Messer. had a good basis for believing that the 120th Street address was where Bowen was currently living since Kelly had told him Bowen was staying at the 120th Street address with his foster mother. In addition, Messer. checked Bowen's name on the Cal Gangs record. Bowen's name on the Gang Member Subject File Report indicates that Bowen verbally told the Century deputies that his address as of May 17, 2003 was the 120th Street address.

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| On November 3, 2003, Messer. searched the County Warrant System ("CWS"), and spoke with Sgt. Frank Carey at Century OSS to see if he was familiar with this location. Carey was familiar with the house and it was known to the station as a problem house. Messer. Decl., ¶22; DMV computer [ER 1359] printout re Jerry Ray Bowen, Bates Stamp No. SEB 0098-99, Exhibit F; Gang Member Subject File Report, subject ID CA01-0000056886 re Jerry Bowen, Bates Stamp No. SEB 0092-00097, Exhibit G; Consolidated Criinal [sic] History Transcript (computer printout) re: Jerry Ray Bowen Bates Stamp No. SEB0112-0129, Exhibit H. | |
| 19. Messer. also ran Bowen's name to see if he was on probation or parole and found that Bowen was on summary probation for spousal battery and driving on an unlicensed driver | 19. Objection. Hearsay, Best Evidence Rule, Speculation, no foundation, Harvey/Madden Rule (*People v. Harvey,* 156 Cal.App.2d 516 (1958); *People v. Madden,* 2 Cal.3d 1017 (1970)). |

charge. Messer. Decl., ¶23; Consolidated Criminal History Transcript (computer printout) re Jerry Bowen, Bates Stamp No. SEB0112-0129, Exhibit H.

20. Defendants' expert William P. Flynn, concludes that "any reasonable and prudent police officers with the same experience and training as Detective Messer. and, having the same knowledge and facts of the incident and investigation, would have reasonable [sic] concluded that the suspect resided at the 120th Street address." Flynn also found [ER 1360] that "there is not reason why Detective Messer. should have disbelieved the victim inasmuch as she was in fear of [sic] her life and most assuredly would have wanted the suspect apprehended." Declaration of Expert Witness William P. Flynn, pgs. 3-4, ¶2, Exhibit M.

20. Objection. Irrelevant, speculation, Messerschmidt's subjective beliefs or reasoning is irrelevant. *Graham v. Connor,* 490 U.S. 386, 396 (1989). Undisputed that Flynn reaches that conclusion. Improper expert opinion.

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| 21. After Messer. interviewed everybody and did all the computer checks, Messer. started gathering all his information and prepared his search warrant affidavit for the issuance of an arrest warrant for Bowen and a search warrant for the 120th Street residence. Based on the information Messers. obtained from his computer checks, coupled with the fact that the suspect had been identified and was known personally by Kelly as the person who physically assaulted and later shot at her, Messer. requested a Ramey Warrant be issued for Jerry Ray Bowen for his involvement in the assault crimes. The warrant affidavit was rviewed [sic] and approved by Sergeant Lawrence, Messer.'s team sergeant at Lennox Operation Safe Streets, and Lt. Ornales. [ER 1361] Deputy District | 21. Objection. Hearsay, Messerschmidt's subjective beliefs or reasoning is irrelevant. *Graham v. Connor*, 490 U.S. 386, 396 (1989); Best Evidence Rule, Speculation, no foundation, Harvey/Madden Rule (*People v. Harvey*, 156 Cal.App.2d 516 (1958); *People v. Madden*, 2 Cal.3d 1017 (1970)). Disputed that everything in the warrant was truthful and accurate. See Plaintiffs' Separate Statement, nos. 15-29. |

Attorney Janet Wilson also reviewed and approved the warrant. Everything Messer. wrote on the warrant affidavit was truthful and accurate based on his investigation of the facts in this case. In the affidavit, Messer. stated he had conducted an extensive background search on the suspect by utilizing departmental records, state computer records, and other police agency records and had determined that the suspect lived at the 120th Street location. This statement, and all th [sic] statements on the affidavit were truthful and accurate based on his investigation of the facts in this case. Messer. Decl., ¶24; State of California, County of Los Angeles, Los Angeles County Sheriff's Department, Search Warrant & Affidavit (Affiant Statement), (Statement of Probable Cause),

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| (Affidavit), file no. 403-10148-0371-051, Bates Stamp No. SB0374-0384, signed by Judge Eudon Ferrell on November 4, 2003, Exhibit E. | |
| 22. Defendants' expert Flynn concludes that Det. Messer.'s Affiant [ER 1362] Statement and Statement of Probable Cause were complete and accurate. | 22. Objection. Improper expert opinion, speculation, Hearsay, Best Evidence Rule. Disputed that everything in the warrant was truthful and accurate. See Plaintiffs' Separate Statement, nos. 15-29. Undisputed Flynn reached that conclusion. |
| 23. Messer. requested that the Search Warrant be endorsed for night service due to the fact that the investigation had shown that the primary suspect in this case had gang ties to the Mona Park Crip gang based on information provided by Ms. Kelly and the Cal-gang data base. Also Messer. believed the nature of the cvrime [sic] – assault with a deadly weapon – showed that night service would provide an | 23. Objection. Hearsay, Messerschmidt's subjective beliefs or reasoning is irrelevant. *Graham v. Connor,* 490 U.S. 386, 396 (1989); Best Evidence Rule, Speculation, no foundation, Harvey/Madden Rule (*People v. Harvey,* 156 Cal.App.2d 516 (1958); *People v. Madden,* 2 Cal.3d 1017 (1970)). Disputed that people in the home were Mona Park Crip Gang Members, defendants have not produced any evidence of that; irrelevant as to items not |

added element of safety to the community, as well as for the deuty [sic] personnel serving the warrant, based on the element of surprise. The request for SEB service of the warrants was based upon several factors. Bowen was a known Mona Park Crip gang member and 'Three-Strike' candidate with an extensive criminal background that included numerous assault and weapons charges, the door was fortified with security bars, and a sawed-off shotgun [ER 1363] was used in the commission of the crime. Additional information indicated that other persons associated with the home, some of the Millender family members, were active Mona Park Crip gang members. After Messer.'s review of Bowen's criminal history and his discussions with Kelly and Floyd, Messer. formed the opinion that included in the warrant affidavit.

Bowen was an active "Mona Park Crip" gang member and a very dangerous person. In fact, Bowen's prior felony convictions caused him to be a "third strike candidate" pending his conviction of the cvrimers [sic] he allegedly perpetrated against Kelly. Due to Bowen's history of violence, his use of a firearm and his prior felony convictions, Messer. believed the warrant service classification should escalate from "lower-risk" to "high-risk." Also Messer. later determined that the warrant location had a metal security door. Therefore, as a result of his knowledge regarding Bowen and the warrant location, Messer. believed that the criteria for "high-risk" had been satisfied. On November 3, [ER 1364] 2003 Messer. consulted with Lt. Maxwell of the LASD SEB SWAT team. As a result of his consultation

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| with Lt. Maxell, [sic] the SEB SWAT team's Blue Team, under eam [sic] leader Sgt. Walker, was requested to assist LASD Lennox OSS with the warrant service at the 120th Street location. Messer. Decl., ¶25. | |
| 24. Defendants' expert Michael W. Odle, concludes that this decision to utilize the SEB SWAT team for the warrant service was prudent and comports with SWAT deployment criteria recognized throughout the law enforcement and tactical community. Report of Expert Witness Michael W. Odle, Opinion 1, pg. 7, Exhibit N. | 24. Undisputed Odle reaches that conclusion. Irrelevant. Disputed. **Ex NN** (Roger Clark Declaration of Opinions, pp. 7-10). |
| 25. Messer. also believed that the items sought in the search warrant would be in the possession of Bowen and the recovery of the weapon could be invaluable in the successful prosecution of the suspect involved in this | 25. Objection. Hearsay, Messerschmidt's subjective beliefs or reasoning is irrelevant. *Graham v. Connor,* 490 U.S. 386, 396 (1989); Best Evidence Rule, Speculation, no foundation. |

case, and the curtailment of other crimes being committed. The items sought in the search warrant were: 1) "All handguns, [ER 1365] rifles, or shotguns of any caliber, or any firearms capable of firing ammunition, or firearms or devices modified or designed to allow it to fire ammunition. All caliber of ammunition, miscellaneous gun parts, gun cleaning kits, holsters which could hold or have held any caliber handgun being sought. Any receipts or paperwork, showing the purchase, ownership, or possession the handguns being sought. Any firearm for which there is no proof of ownership. Any firearm capable of firing or chambered to fire any caliber ammunition", and 2) "Articles of evidence showing street gang membership or affiliation with any Street gang to include but not

limited to any reference to "Mona Park Crips", including writings or graffiti depicting gang membership, activity or identity. Articles of personal property tending to establish the identity of person in control of the premire [sic] or premises. Any photographs or photograph albums depicting persons, vehicle, weapons or locations, which may appear relevant to [ER 1365] gang membership, or which may depict the item being sought and or believed to be evidence in the case being investigated on this warrant, or which may depict evidence of criminal activity. Additionally to include any gang indicia that would establish the persons being sought in this warrant, affiliation or membership with the "Mona Park Crips" street gang. Messer. Decl., ¶26; State of California, County of Los Angeles, Los Angeles County

Sheriff's Department, Search Warrant & Affidavit (Affiant Statement), (Statement of Probable Cause), (Affidavit), file no. 403-10148-0371-051, Bates Stamp No. SB0374-0384, signed by Judge Eudon Ferrell on November 4, 2003, Exhibit E.

26. Messer. stated in the warrant affidavit that he believed the items sought will be in the possession of Jerry Ray Bowen and the recovery of the weapons could be invaluable in the successful prosecution of the suspect involved in this case, and the curtailment opf [sic] further crimes being committed. The [ER 1367] statement was truthful and accurate based on Messer.'s investigation of the facts in this case. Messer. obtained an arrest warrant for Bowen as well as a search warrant for the residence. Messer. Decl., ¶¶27-28; State of California, County of Los

26. Objection. Hearsay, Messerschmidt's subjective beliefs or reasoning is irrelevant. *Graham v. Connor,* 490 U.S. 386, 396 (1989); Best Evidence Rule, Speculation, no foundation, Harvey/Madden Rule (*People v. Harvey,* 156 Cal.App.2d 516 (1958); *People v. Madden*, 2 Cal.3d 1017 (1970)). Disputed that everything in the warrant was truthful and accurate. See Plaintiffs' Separate Statement, nos. 15-29.

Angeles, Los Angeles County Sheriff's Department, Search Warrant & Affidavit (Affiant Statement), (Statement of Probable Cause), (Affidavit), file no. 403-10148-0371-051, Bates Stamp No. SB0374-0384, signed by Judge Eudon Ferrell on November 4, 2003, Exhibit E.

27. On November 3, 2003, Messer. contacted Lt., Maxwell at SEB and told him that based on his preparation check sheet and the nature of the crime, Messer. believed that a SWAT team would be required to execute the warrant because it was considered high risk. Messer. had a briefing with the LASD SEB SWAT team, and went over the history of the incident, the suspect's record, and the photographs of the 120th Street location which he had taken several days before the warrant was [ER 1368] served. The warrant service mission

27. Objection. Hearsay, Messerschmidt's subjective beliefs or reasoning is irrelevant. *Graham v. Connor*, 490 U.S. 386, 396 (1989); Best Evidence Rule, Speculation, no foundation.

was assigned to the SEB SWAT team's blue team under the direction of SWAT team leader Sergeant Walker. Messer. Decl., ¶¶29-30.

28. On November 6, 2003 at approximately 0500 hours, the Special Enforcement Bureau ("SEB") Blue Team served a high-risk search and arrest warrant at 2234 E. [sic] 120th Street (E. 120th Street location") in the City of Los Angeles. The residence was occupied by the Millender family. The warrant was issued for Jerry Bowen for his onvolvement [sic] in an assault crime on the victim, Shelly Kelly. The warrant was served at the request of Messer. The suspect, Jerry Bowen, was wanted for assault with a deadly weapon and was known to routinely carry a sawed off shotgun. Based on this and the suspect's violent criminal history, the warrant

28. Objection. Hearsay, Best Evidence Rule, Speculation as to why the warrant was endorsed for night service. Disputed Bowen was known to routinely carry a weapon. Defendants have submitted no evidence of this and it is not included in the warrant affidavit. **Ex J** (affidavit); **Ex C** (videotaped interview and transcript 7:11-8:16 (on the day Bowen assaulted Kelly, he was not "carrying" the gun, but when he arrived at the home, he had to go inside to get it).

was enfdorsed [sic] for night service. On November 6, 2003, at approximately 0500 hours, the SEB Blue Team served the search and arrest warrant at the 120th Street location. Messer. was positioned [ER 1369] in the middle of the street to the east of the location with Det. Pickett in order to stop traffic. Messer. Decl., ¶31; Walker Decl., ¶¶1-3.

29. Walker reviewed the Search Warrant and supporting Affidavit before the search warrant was served and made sure his Team knew what was in the warrant. Walker also saw on the fron tpage [sic] of the Search Warrant that a Deputy District Attorney had reviewed and approved the warrant before the Judge reviewed and signed the warrant. Based on the independent review by the DDA and the Superior Court Judge, Walker

29. Objection. Hearsay, Walker's subjective beliefs or reasoning is irrelevant. *Graham v. Connor,* 490 U.S. 386, 396 (1989); Best Evidence Rule, Speculation.

believed they were serving a valid search warrant and so informed the SEB deputies involved in the warrant service. Walker Decl., ¶4.

30. In preparing for the service of the search and arrest warrant at the 120th Street location, Walker formulated a plan for service of the warrant. After the search was .completed, this information was filled out in the Team Activation packet. The mossion [sic] for SEB personnel, [ER 1370] as stated on the Team Activation packet was "to safely execute the search warrant, detain all the occupants on the property and secure the location for investigators. Once that's accomplished the investigators will continue with their investigation." Walker Decl., ¶5; SEB Team Activation Packet, date rec'd 11/3/03, date of activity 11/6/03, warrant, Station unit

30. Objection. Hearsay; Best Evidence Rule; speculation; irrelevant as to what actually occurred during the warrant service. **Ex L** (CD and transcripts of entry).

requesting: Lennox OSS, Person Requesting: Det. Messerschmidt, Command Post Location: Century Station, location of incident: 2234 E. [sic] 120th St., L.S., Bates Stamp No. SEB0004-0012, Exhibit P.

31. The "Plans to Accomplish the Mission" section of the Team Activation packet stated: "Once containment personnel are in place, the entry team will approach the front of the location on the armored vehicle and approach the front door. Knock and notice announcements will be given via a prerecorded taped announcement on a PA system as well as verbal announcements at the front door. If there is no [ER 1371] acknowledgment at the door by the occupants, the team will breach the front door and make limited penetration in to the house. In addition, the window near the front door will

31. Objection: hearsay, Best Evidence Rule; irrelevant as to what actually occurred. **Ex L** (CD and transcripts of entry).

be ported so that we can provide cover for the breaching team as well as providing us the opportunity to prevent injury to occupants inside. If occupants are encountered, they will be directed toward us and lead outside to a safe area. Once the occupants are out, the team will clear the location and render it safe for the handling detectives." Walker Decl., ¶6; SEB Team Activation Packet, date rec'd 11/3/03, date of activity 11/6/03, warrant, Station unit requesting: Lennox OSS, Person Requesting: Det. Messerschmidt, Command Post Location: Century Station, location of incident: 2234 E. [sic] 120 St., L.S., Bates Stamp No. SEB0004-0012, Exhibit P.

32. The warrant service mission was assigned to the SEB SWAT team'sblue [sic] team under Walker's direction as SWAT team leader.

32. Undisputed.

The following personnel [ER 1372] were assigned to the following positions: Entry Team: Scott wiolliam [sic] Walker, Rick Rector, Donald Michiporuk [sic], Richard Schlegel, Deputy Brice Stella, Jack Demello, David O'Sullivan, and James Ritenour. Containment Team: Michael Wilber, Thomas Harris, Ian Stade, William Murray, Leo Foisner, John Bones, Phillip D. Geisler, Mark Desmarteau, Carlos L. Parge, Patrick N. Hayes, and Richard B. Conti. Emergency medical personnel. J. Harrell and L. McCabe Walker Decl., ¶7.

33. Defendants' expert, Michael W. Odle, concludes that in the actual execution of the search and arrest warrant service, the SWAT team personnel achieved their stated "Mission" and formulated and implemented an appropriate tactical "Plan" because the planning phase and

33. Undisputed Odle reaches that conclusion. Irrelevant. Disputed. **Ex L** (CD and transcripts of entry); **Ex NN** (Roger Clark Declaration of Opinions).

tactics chosen for entry were responsible, prudent and comport with planning operations and tactics used throughout the tactical community. Report of Expert Witness Michael W. [ER 1373] Odle, Opinion 2, pg. 10, Exhibit N.

34. Several days before the warrant service, the SEB SWAT personnel began the information and planning process based oin [sic] the information given to them by Messer. regarding the wanted suspect, warrant location, and date and time of service. This information was recorded on the SEB Activation Request – Preliminary Data Form. After receiving the preliminary information from Messer., the SEB SWAT personnel developed a tactical plan for the warrant service. They reviewed the search warrantm, [sic] search warrant checklist, criminal history of Jerry Bowen,

34. Objection. Hearsay, Walker's subjective beliefs or reasoning is irrelevant. *Graham v. Connor,* 490 U.S. 386, 396 (1989); Best Evidence Rule, speculation, no foundation, Harvey/ Madden Rule (*People v. Harvey,* 156 Cal.App.2d 516 (1958); *People v. Madden,* 2 Cal.3d 1017 (1970)).

operations plan from Messerschmidt's unit, and photographs. Mr. Bowen had an extensive criminal history revolving around weapons, possession and violence. Bowen was an active gang member with a violent background, which Walker took into consideration in formulating the plan for the warrant service. Prior to the warrant service, Walker explained the plan to the personnel involved in the warrant [ER 1374] service, and briefed everybody on their assigned role. Walker Decl., ¶8; SEB Activation Request – Preliminary Data Form, warrant to be served on 11/6/03 at night, originator: Kurt [sic] Messerschmidt, target location: 2234 W. 120th St., LA, Bates Stamp No. SEB 0001, Exhibit Q.

35. On November 4, 2003, two days before the service of the warrant, Walker drove by

35. Undisputed.

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| the Millender home in an undercover vehicle in order to obtain photographs for the warrant service planning. Walker was accompanied by Deputies Rector, Nichiporuk, Stella and Stade. They took photographs and looked at the area in order to determine how they were going to serve the warrant. They did not have contact with anyone from the residence on that date. Walker Decl., ¶9; Defendant Nichiporuk's Responses to Brenda Millender's Second Set of Interrogatories, No. 1, Exhibit R; Defendant Stella's Responses to Brenda Millender's Second Set of Interrogatories. No. 1, Exhibit S; [ER 1375] Defendant Rector's Responses to Brenda Millender's Second Set of Interrogatories, No. 1, Exhibit T. | |
| 36. On November 5, 2003, Walker and Deputy Stella drove around the area of the Millender | 36. Objection: hearsay. Disputed. **Exhibit U** (Mrs. Millender 67:18-20, 70:2-5, 76:8-14, 77:1-3, |

for an opportunity to arrest Bowen if they happened to see him. Deputies Rector and Nichiporuk assisted them in a separate car. Deputies Stella and Walker contacted four to five male blacks who were shooting dice on the sidewalk directly in front of the Millender home. A couple of the males matched the general description of Bowen, black male, five-ten to six feet tall, around 200 pounds, and in his early thirties. Deputies Stella and Walker spoke with the males while Deputies Rector and Nichiporuk walked down the Millenders' driveway. Deputies Stella and Walker determined that Bowen was not part of the group. Walker saw an older woman who he now believes was Augusta Millender speaking to the Deputies Rector and Nickiporuk. Walker saw them talking, but could 78:1-3, 78:23-79:3) (The deputies asked about Jerry Bowen and Mrs. Millender told them he did not live there. When they asked to come into the house, she told them they could if they had a warrant. They laughed and left). Plaintiffs were unable to obtain bolstering evidence from the men who were there because although defendants ran the men for wants [sic] and warrants, they have failed to turn over any document with the men's names and identifying information, although they testified those records should be available. **Ex Y** (Walker 121:24-123:6, 129:17-19); **Ex AA** (Stella 29:8-19. 37:1-39:22).

not hear what they were saying. Walker walked [ER 1376] up the driveway and found out from the deputies that the males were not directly associated with the home, and did not live there. Walker saw another female who he now believes was Brenda Millender outside. Walker does not recall any specific conversation with either female. Rector talked to either Augusta or Brenda Millender and asked her about the men who were in from [sic] of her property. The woman said she did not know any of them and did not give them permission to be there. Walker Decl., ¶10; Defendant Nichiporuk's Responses to Brenda Millender's Second Set of Interrogatories, No. 1, Exhibit R; Defendant Stella's Responses to Brenda Millender's Second Set of Interrogatories, No. 1, Exhibit S; Defendant Rector's Responses

to Brenda Millender's Second Set of Interrogatories, No. 1, Exhibit T; Rector depo.: 32:1-19, Exhibit U; Johnson depo.: 37:2-28, Exhibit V.

37. For the November 6, 2003 warrant service on the Millender residence [ER 1377] located at the E. 120th Street location, Defendants Rector was the scout responsible for coordinating all the personnel who were going to be involved in the activity and/or delegating jobs. Rector was the first deputy to step through the door. Defendant Nichiporuk was the back-up who assisted Deputy Rector with his duties. Nichiporuk was the second deputy to step through the door. Walker was the third man on the entry team. Defendant Schlegel was the fourth man on the entry team, and one of his responsibilities was to be part of the breaching team in the even

37. Undisputed.

[sic] that they had to force entry. Defendant Stella was the fifth man on the entry team responsible for logistics and equipment when they got activated. For the search warrant services, Stella was responsible for making sure they got all the logistical equipment that they needed. The sixth man on the entry team was Defendant Demello. He was part of the breaching team. Defendants O'Sullivan (part of the breaching team) and Ritenour also were on the entry team and entered the E. [ER 1378] 120th Street residence during service of the warrant. Walker Decl., ¶11.

38. On November 6, 2003, Walker arrived at the 120th Street location on the SWAT armored rescue vehicle. At approximately 0500 hrs., the rear containment team (Bones and Foisner – Containment 3) were

38. Objection. Speculation, hearsay, Walker's subjective beliefs or reasoning is irrelevant. *Graham v. Connor,* 490 U.S. 386, 396 (1989); Best Evidence Rule, Speculation, no foundation, Harvey/Madden Rule (*People v. Harvey,*

in position prior to the arrival of the remainder of the containment and entry personnel. The other containment personnel took their positions around the location as the entry team approached the front door. As the entry team and Walker got off the vehicle and started to walk towards the front door of the house, a containment position deputy's voice came on the air and said that he could see a light on and movement at the back of the house. Walker inferred from this remark that somebody was up and moving, potentially Jerry Bowen. At this point, Walker believed their position was compromised. Given the suspect's violent history, the circumstances became exigent, and Walker made the [ER 1379] decision to speed the process up and to gain entry into the residence. Walker's considerations

156 Cal.App.2d 516 (1958); *People v. Madden*, 2 Cal.3d 1017 (1970)). Disputed that anyone reported movement and a light on. **Ex K** (Team Activation Packet); **Ex GG** (radio log); **Ex Y** (Walker 43:12-19).

included possible destruction of evidence, the suspect having time to arm himself, officer safety and the safety of the residents inside the location. Walker Decl., ¶12; Rector depo.: 62:4-63:5, Exhibit U; Bones depo.: 38:12-39:21, 41:1-23; 43:1-3,Exhibit W; Stella depo.: 55:19-23, Exhibit X; County of Los Angeles – Sheriff's Department Supplemental Report; SEB 0013-0014, Exhibit KK.

39. As the entry team approached the front door of the house, Walker directed that a pre-recorded knock and notice taped announcement be played over a PA system. The recording was played from a PA system at the curb in front of the Millenders' house. The announcement was a pre-recorded search warrant announcement that was made by Deputy Geisler some time prior to our entry. Several prerecorded

39. Objection. Hearsay. Disputed. **Ex L** (CD and transcripts of entry)

announcements, identifying them as law enforcement officers and describing their [ER 1380] intentions to serve a search warrant, were played from the vehicle public address system from the northwest corner of the lot. After Walker directed the prerecorded announcements to play, he also gave several verbal announcements. His verbal announcements were words to the effect of "Sheriff's Department, we've got a search warrant. Come to the door or open the door." Walker said this two to four times. Deputy Rector banged on the door to notify the occupants there. Walker Decl., ¶13; Messer. Decl., ¶32; Rector depo." 68:21-24, Exhibit U; Augusta depo.: 11:12-18, 25:19-22, Exhibit L; Johnson depo.: 8:23-25, 9:2-6, 10:19-25, Exhibit V; Brenda depo.: 27:7-12, 30:25-31:2, Exhibit Y; County of Los Angeles

– Sheroff's [sic] Department Supplemental Report SEB0013-0014, Exhibit KK.

40. When there was no response from the interior of the main house, Walker ordered O'Sullivan to break and rake the front window. When Walker said that, that also meant to Deputies Schlegel and [ER 1381] Demello to force open the front security door. Walker ordered Dep. O'Sullivan to break the front window of the location, to allow the entry team to see into the location and protect the deputies as they tried to open the door. Walker directed that the front security door and interior door be forced open. Break and rake means break the glass and rake the glass out of the frame. What you are trying to do is make it safe for whoever is standing in and around the window so there are no jagged

40. Objection. Hearsay, Best Evidence Rule. Disputed. **Ex L** (CD and transcripts of entry).

edges. Once the security door was opened, it allowed the entry team access into the hallway which led to the living room area of the location. They ported the window and broke the door in order to see inside the house. After listening to the audiotape of the 11/6/03 entry, and using a stopwatch, Walker estimates that from the time he asked for the announcements to be started on the tape, to the time when they actually gained entrance into the residence after porting the window and breaking the door, approximately 20 seconds elapsed. [ER 1382] Walker Decl., ¶14; Brenda depo.: 34:17-18; Brenda depo: 37:17-22, 40:13-2, Exhibit Y; Augusta depo.: 25:23-25, Exhibit L; Johnson depo.: 10:13-16, Exhibit V; Audiotape of 11/6/03 entry stored on enhanced CD, Exhibit AA, County of Los

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| Angeles-Sheriff's Department Supplemental Report, SEB 0013-0014, Exhibit KK. | |
| 41. Defendants' expert Michael W. Odle concludes that the SWAT team personnel provided knock notice and that the tactics employed them [sic] were prudent and comport with tactics used throughout the tactical community. Report of Expert Witness Michael W. Odle, Opinion 3, pg. 11, Exhibit N. | 41. Objection. Hearsay, Best Evidence Rule. Disputed. **Ex. L** (CD and transcripts of entry); **Ex NN** (Roger Clark Declaration of Opinions). |
| 42. As the team entered the location, they continued to identify themselves as law enforcement personnel and said that they had a search warrant. The first group – Rector, Nichiporuk and Walker – were the first three through the door. After the doors were opened, Walker stepped inside and contacted Brenda Millender, who was directed to personnel behind him. Walker told | 42. Undisputed. |

her [ER 1383] he had a search warrant and that she needed to go out of the house. Walker did not have contact with her again. She got passed [sic] behind Walker and directed out of the house. Walker also contacted Augusta Millender, told her we had a search warrant and she was directed to personnel behind him. Walker did not have contact with her again. Walker also contacted William Johnson, who was directed to personnel behind him. Walker did not have contact with him again. Walker Decl., ¶15; Rector repo.: 72:10-76:7 (Exhibit U); Augusta depo.: 198:22-20:2 (Exhibit L); Brenda depo.: 42:18-20, 43:13-14 (Exhibit Y).

43. Rector pointed his weapon in the direction of and to the side of Augusta and Brenda Millender. Brenda testified that the only deputy who pointed a gun at

43. Disputed in that some deputy pointed his weapon directly at Mrs. Millender. **Ex U** (Mrs. Milledner [sic] 35:5-11).

her was the one who first came through the window. Brenda did not see any other deputy use any other kind of weapon like a baton or spray. Rector depo.: 76:11-25 (Exhibit U); Augusta depo.: 37:4-5, 38:17-19 [ER 1384] (Exhibit L); Brenda depo.: 112:6-17, 18-23 (Exhibit Y).

44. Walker's weapon briefly was pointed in the direction of Brenda, Augusta and William Johnson as they were directed outside. As the occupants were contacted, they were detained and walked outside to awaiting OSS Investigators. This allowed the entry team to safely clear the location. The following people were in the following rooms; Brenda Millender (second bedroom, from the front, on the west side of the house), Augusta Millender (third bedroom on the west side of the house) and William Johnson (third bedroom

44. Objection. Speculation as to who was in which rooms, and irrelevant.

on the west side of the house). Walker Decl., ¶16; Augusta depo.: 36:4-5, 38:17-19 (Exhibit L).

45. As people started to come out of the house, Messer. was requested by SWAT to move up in order to watch the people who had come out of the house. Det. Pickett and Messer. moved to the driveway. Augusta, Brenda and William Johnson, and some other individuals came out of the house. Det. Pickett [ER 1385] escorted Brenda an [sic] Augusta to the car because they were cold. Messer. maintained security on all these people until the location was cleared by SEB. Augusta Millender requested to use the restroom, and Det. Pickett told her as soon as the house was secured by SEB, they would escort everyone back inside and she would be allowed to ise [sic] the restroom. She got up out of the back

45. Objection. Hearsay, speculation. Undisputed that Mrs. Milledner [sic] and Brenda were cold and that Mrs. Millender was not allowed to go back into the house to use the bathroom and that she had to relieve herself in the street. **Ex U** (Mrs. Millender 51:12-21, 52:13-16).

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| seat of the car, pulled up her nightgown, and urinated on the ground. Brenda testified the officer turned away from Augusta so he wasn't watching her. Messer. Decl., ¶33; Augusta depo.: 42:23-25, 43:1-2, 50:5-9, 51:7-13, 51: 14-17, 53:5-6 (Exhibit L); Brenda depo,: 55:5-7, 55:23-25 (Exhibit Y). | |
| 46. Brenda Millender told the deputy she did not want to step outside the house onto the porch, because she was a diabetic and there was glass on the ground. One of the officers took a rug from her mother's living room and threw it over the glass. The officer who escorted her out helped her walk across the glass. [ER 1386] Brenda depo.: 46:20-21, 47:9-12, 47:14-15, 48:10-16, 48:18-24 (Exhibit Y). | 46. Undisputed. |
| 47. Augusta and Brenda Millender and William Johnson sat in the police cars while the house was | 47. Undisputed. |

searched. Brenda told the deputy she was cold and asked the deputy for a blanket, and he gave it to her. Augusta depo.: 54:2-18, 55:18-19, 55:21-23 (Exhibit L); Johnson depo,: 17:1-6, 17:15-23 (Exhibit V); Brenda depo,: 51:6-7, 52:16-19, 99:19-23 (Exhibit Y).

48. When Walker first stepped into the house, he was in the hallway for a few minutes while we got the three individuals out of the house. Then Walker moved into the living room for a few minutes to ensure that nobody else was in there. Walker accompanied the team as the rest of the house was secured. As the entry team continued to clear the house, they came to a locked door that led into the third bedroom on the west side of the house. Believing that it would be unsafe to pass the door and being unable to acquire keys from the [ER 1387] occupants,

48. Disputed that Walker was unable to acquire keys from the occupants. The deputies only asked for car keys and got them. **Ex W** (William 58:5-13).

Walker forced the door open, splintering the door jam. Walker was in the mail [sic] part of the house for approximately twenty minutes. Walker Decl., ¶17.

49. Once the main house was cleared, the entry team went to the east side of the house and exited the kitchen which led to the entrance of the large addition that was attached to the house but had its own, outside, entrance. Walker stepped out a door from the kitchen that led to a covered area to where that front door of the addition was. Deputy Rector made the announcement for the people in the addition to come out. Rector said words to the effect of asking them to come out. It was over a minute for them to come out; they were slow to respond. After announcements were made for the occupants to come out,

49. Undisputed.

seven people walked out. Walker's weapon briefly was pointed in their direction as they stepped out te [sic] door. Walker did not have any further contact with them. The following people were contacted as the entry team ordered them out of the [ER 1388] addition: Willie Millender, Ted Millender, David Millender, Calvin Johnson, Michael Johnson, Vicki Fairman, and Diane Jackson. All of the above listed individuals were led out of the location and detained by OSS investigators outside. Walker Decl., ¶18; Rector depo.: 82:16-83:3 (Exhibit U).

50. None of the people in the addition, Willie Millender, Ted Millender, David Millender, Calvin Johnson, Michael Johnson, Vicki Fairman and Diane Jackson, are plaintiffs in this action. Complaint, Exhibit Z.

50. Undisputed.

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| 51. Walker then assisted in securing the remainder of the house. He helped search for any additional occupants and any outbuildings that may have been on the property, made sure there was no one out there, and made sure the rest of the house was safe in regard to anybody else being inside. Walker did not handcuff anyone, or have any contact with any occupants after they were directed outside of the house. Walker did not participate in searching the house for [ER 1389] evidence. Once the addition, out buildings and backyard were cleared and believed to be safe, the location was turned over to Lennox OSS investigators. Walker Decl., ¶¶19-21 | 51. Undisputed. |
| 52. The primary suspect, Mr. Bowen, was not at the location at the time of service. Walker Decl., ¶22 | 52. Undisputed. |

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| 53. Walker recorded on audio tape the entry on November 6, 2003. Walker Decl., ¶23; Audiotape of 11-6-03 entry (stored on enhanced CD) (Exhibit AA). | 53. Undisputed. |
| 54. The SEB team and Walker left the 120th Street location after the warrant service somewhere past 5:45 in the morning. When they left, the OSS detectives were still there. Walker Decl., ¶24 | 54. Undisputed. |
| 55. After the location was secured, the deputies brought Augusta, Brenda and William Johnson into the living room. The deputy let Brenda go to the rest room and go to her room to get some shoes and a blanket. Augusta depo.: 55:3-15, 59:2-4, 59:9-20 [ER 1390] (Exhibit L); Johnson depo.: 31:2-5 (Exhibit V); Brenda depo.: 60:7-13, 60:24-61:1, 62:3-6, 62:13-15 (Exhibit Y). | 55. Undisputed. |

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| 56. During the time that Augusta and Brenda were sitting in the police car, Brenda did not complain that she had injuries. Augusta never told the deputies that she had to go to the hospital. Augusta depo.: 57:11-13, 104:24-105:4 (Exhibit L); Brenda depo.: 57:4-8 (Exhibit Y). | 56. Disputed because Mrs. Millender could not tell the deputies she needed to go to the hospital. **Ex U** (Mrs. Millender 104:19-105:4). |
| 57. After the location was secured, Lawrence watched the occupants in the living room. He did not apply handcuffs to anyone, or arrest anyone, and did not point his weapon at anyone. Defendant Lawrence's Responses to Brenda Millender's First Set of Interrogatories, No. 1, Exhibit BB. | 57. Undisputed. |
| 58. Defendant Stade was assigned to containment outside the east side of the house. Stade did not apply handcuffs to anyone, or arrest anyone, and did not point his weapon at anyone. Stade did not | 58. Undisputed. |

participate in the search of the residence. Defendant Stade's Responses to Brenda [ER 1391] Millender's First Set of Interrogatories, No. 1, Exhibit CC.

59. Once SEB left the house, Messer. went into the house and gave the search warrant to Sgt. Lawrence who gave a copy of the warrant to Augusta Millender. The following investigators searched the house: Dets. Faulkner, Ortega, Pickett, Valento, Cale and Bercini. When the search was over, Messer. gathered the pieces of evidence they were taking, had the property receipt signed, and they left. Messer. Decl., ¶34; Augusta depo.: 62:14-63:2 (Exhibit L); Brenda depo.: 66:15-67:6 (Exhibit Y).

59. Disputed. No one gave Mrs. Millender the warrant until they were leaving. **Ex U** (Mrs. Millender 63:11-21).

60. The following evidence was recovered from the search of the 120th Street residence: 1) a State of California

60. Disputed that the items were "evidence." Undisputed they were taken.

Social Services letter addressed to the suspect, Jerry Bowen; 2) 1 – shotgun, Mossburg 12 gauge, black in color with wooden stick serial No. J324807; 3) 1 bob [sic] of .45 cal "American Eagle" rounds. The primary weapon sought (shotgun) was not found at the location. Messer. Decl., ¶35; State of California [ER 1392] County of Los Angeles, Return to Search Warrant, search warrant no. 9383, itemizing property seized at 2234 E. 120th Street., LA, Bates Stamp No. SEB 0386, Exhibit K.

61. The deputies did not find Bowen at the Millender house. However, Det. Bercini recovered evidence that indicated Bowen had lived at the 120th Street location. This evidence was a letter regarding a medical appointment that was sent from the State of California in June 2003 to Bowen at the 120th Street address.

61. Disputed that the letter "indicated Bowen had lived at the 120th Street location." Rather the letter indicated that Bowen received a piece of mail, dated June 2003, at that location. **Ex O** (letter).

Additionally, as per the search warrant affidavit, which authorized search and seizure of all handguns, rifles and/or shotguns of any caliber that may be found at the warrant location, Det. Ortega recovered a "Mossberg" shotgun and Det. Bercini recovered a box of .45 caliber ammunition. Messer. Decl., ¶36; State of California County of Los Angeles, Return to Search Warrant, search warrant no. 9383, itemizing property seized at 2234 E. 120th Street., LA, Bates Stamp No. SEB 0386, Exhibit K.

[ER 1393] 62. No injuries were reported to SEB SWAT personnel arising from the search of the 120th Street location. Messer. Decl., ¶37.

62. Undisputed.

63. On November 19, 2003, Messer., along with the Major Crimes Fugitive Taskforce, conducted a surveillance of 1425 West 97th Street.

63. Undisputed.

During that surveillance, Messer. contacted Kelly and received additional information as to the possible whereabouts of Bowen. That information included Bowen's mother-in-law's residence at 4127 Dalton Avenue in Los Angeles and an unknown motel in the area of 41st Street and Figueroa Avenue in Los Angeles. Bowen was found at a motel, and was arrested, and later convicted of assault with a deadly weapon arising out of this incident. Messer. Decl., ¶38; County of LA Sheriff's Dept. Supplemental Report, file 403-19148-0371-051, Bates Stamp No. SEB 0137, Exhibit HH; People v. Bowen Criminal History report, Bates Stamp No. SEB 0144-145, Exhibit II.

64. The preparation and execution of [ER 1394] the search warrant had nothing to do with the Millenders' race. Messer. Decl., ¶39.

64. Disputed. **Ex** * (list of personnel complaints) (includes fifteen complaints, many of which directly mention racial discrimination. The complaints

include "traffic citation" by Elia Wickers, "use of force/discourtesy" by Kenny Da Lei, "traffic citation/ discrimination" by Darnell Demery, "traffic stop" by William Allen, "improper search" by Augustine Mario Parra, "improper search" by Demecria Dawson, "racial profiling" by Rodney Williams, "traffic citation" by Meredith Williams, "search warrant" by Arthur Lawrence, "use of Force" by Cebert Hayes, "use of force" by Gary Dingless, "improper detention" by William Stacy McClain, "improper search/house" by Josh Gonzalez, "use of force" by Christopher Lewis, "use of force" by Gary Scott and "false arrest/drunk driving" by Lora Lenin. Clearly, there are complaints of overt racial discrimination, and others, which if probed further, most likely include racial discrimination as well.). See also Declaration of Samantha Koerner attached to Opposition to

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| | County Defendants' Motion. |
| [ER 1395] 65. Plaintiffs claim the following damage: broken glass window, damages wrought iron front door, broken door leading to Augusta Millender's bedroom; ripped curtains, broken chandelier, damaged throw rug. Augusta Millender's response to County of Los Angeles's Interrogatories, Set 1, Interrogatory No. 10, Exhibit DD. | 65. Disputed. What is listed is only *property* damage. |
| 66. During the incident, only Johnson was handcuffed; Augusta and Brenda were not handcuffed. While Johnson testified that his arm was sore for the next 2-3 days as a result of the handcuffs being too tight, he also testified that the deputy did not use unnecessary force while he was handcuffing him. Johnson depo.: 16:9-13, 14:17-25, 15:21-22, 16:23-25, 24:15-20 (Exhibit V); Augusta | 66. Disputed. When William asked the deputy to loosen the cuffs, he would not, and as a result his wrist and arm were sore and a little numb for the next few days. **Ex W** (William 24:19-25:23) |

depo.: 63:22-23, 110:3-6, 110:25-111:2, 111:8-11 (Exhibit L).

67. Johnson testified that he asked the deputy if he could get the handcuffs off his hands, and also told the deputy he needed to be at work within an hour or so. The deputies said they would try to get him out of there within the hour. [ER 1396] Johnson testified that the deputies took the handcuffs off the individuals one at a time and he was the last to have them removed. Johnson depo.: 32:2-12 (Exhibit V)

67. Objection. Hearsay.

68. While Augusta Millender was standing outside the house for 30 minutes, nobody pointed a gun at her and nobody pointed a gun at her while she was in the police car. Augusta depo.: 61:14-20 (Exhibit L).

68. Undisputed.

69. Augusta testified that the deputies did not call her names, or yell at

69. Disputed. Johnson testified one of the deputies was courteous to him.

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| her, or touch her. The deputies were not rude to her or the occupants of the house. Johnson testified that the deputies were courteous to him and turned on the heat for him, Brenda does not remember the officers being rude to her during the incident. Augusta depo.: 106:1-13 (Exhibit L); Johnson depo.: 21:21-22:1, 24:11-14, 35:15-19 (Exhibit V); Brenda depo.: 49:5-15 (Exhibit Y). | **Ex W** (William 21:21-22:1). |
| 70. Augusta testified that none of the people in the house told Augusta that they were physically abused by any of the police officers. [ER 1397] Augusta depo.: 109:23-110:2 (Exhibit L) | 70. Undisputed. |
| 71. Defendants' expert, Michael W. Odle, concludes that the tactics used during the entry and search were prudent and comport with tactics used throughout the tactical community. Report of Expert Witness | 71. Undisputed Odle reaches that conclusion. Irrelevant. Disputed. **Ex L** (CD and transcripts of entry); **Ex NN** (Roger Clark Declaration of Opinions). |

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| Michael W. Odle, Opinion 4, pg. 12, Exhibit N. | |
| 72. Willie Millender (not a plaintiff) was arrested for violation of Health & Safety Code section 11550(a) [under the influence of a controlled substance]. County of Los Angeles Sheriff's Dept. Supplemental Report, Bates Stamp No. SEB 0412-0416, Exhibit EE. | 72. Undisputed. |
| 73. Approximately nine months after the incident, August 9, 2004, a court granted a motion to quash the November 4, 2003 search warrant in the prosecution fo [sic] Willie Millender (not a plaintiff to this action) on an unrelated charge. 8-9-04 Order, Superior Court Case No. 3CM09209, Exhibit FF; 1538.5 Hearing, Reporter's Transcript, August 9, 2004, Superior Court Case No. 3CM090209, Exhibit GG; Complaint, ¶21, Exhibit Z | 73. Objection. Vague as to the terms, "unrelated charge." Undisputed the Court granted a motion to suppress evidence based upon Messerschmidt's warrant affidavit lacking probable cause. **Ex T** (8/9/04 Reporter's Transcript). |

74. On or before November of 2003, [ER 1398] the policy, custom and practice of the municipal defendants prohibited peace officers from conducting unconstitutional searches and/or seizes, from using excessive force, or from otherwise violating the civil rights of any person. Hutchens Dec., ¶¶2-5

74. Objection. Improper legal opinion no foundation, so vague and imprecise as to be irrelevant. There is no foundation that Hutchens is an expert on the Constitution, or with regard to any other matter about which she offers her opinion.

There is no showing of on what Hutchens bases her opinion. For any opinion to be admissible, the declarant must establish an adequate foundation.

If offered as a lay opinion, it is clearly inadmissible, for it is not the type opinion a lay witness is permitted to give. *Federal Rules of* Evidence, Rule 701.

If offered as an expert opinion, it is inadmissible because Hutchens' declaration fails to establish any facts which would qualify her as an expert competent to render the opinion she offers, or the facts upon which she bases her opinion. *Federal Rules of Civil Procedure,* Rule

26(a)(2). Hutchens is not qualified to render an opinion that Sheriff's Department policy "prohibited peace officers from conducting unconstitutional searches and/or seizes, [ER 1399] from using excessive force, or from otherwise violating the civil rights of any person." Before a person is permitted to testify as an expert as to a given subject matter, he or she must of course establish the requisite expertise in that area. *Federal Rules of Evidence,* Rule 702. Hutchens does not show that she is an expert on constitutional rights. There is nothing inherent in Hutchens' position which makes her an expert on the Constitution. A constitutional scholar, for example a judge, might qualify himself or herself as an expert on what rights the Constitution protects; Hutchens does not purport to be a constitutional scholar, judge, or lawyer.

Moreover, Hutchens provides absolutely no clue what the basis for her opinion is. It is therefore impossible to determine whether the factual basis is "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject." *Federal Rules of Evidence,* Rule 703. See Plaintiffs' Objection to the Declaration of Hutchens, filed herewith.

[ER 1400] Disputed. Defendants acknowledge their actions were in accordance with Department policy and claim they acted properly. **Ex X** (Messerschmidt 140:15-24); **Ex Y** (Walker 137:19-140:25); **Ex Z** (Rector 98:5-99:17); **Ex AA** (Stella 94:20-97:2); **Ex BB** (Nichiporuk 85:10-87:21). This testimony is buttressed by other evidence. Before submitting his affidavit and the proposed warrant to the court, Messerschmidt's superiors reviewed it and approved

it. **Ex X** (Messerschmidt 30:25-32:1). Lt. Maxwell, the incident commander, approved everything from the initial assignment of SWT to break in. **Ex CC** (Maxwell 36:15-37:5, 51:17-53:11, 55:10-25, 81:13-21, 128:12-129:3). The Special Enforcement Bureau SWT commander, Lieutenant Evans also reviewed defendants' reports and the entry audiotape. **Ex CC** (Maxwell 37:23-39:13); **Exhibit KK** (Evans 5:7-9 (at SEB for 4 years), 6:8-11 (was Lt in charge of SWT while at SEB), 6:12-7:1 (responsible for many things, including supervision and training). After the [ER 1401] incident, Evans was responsible for and did review the Team Activation and audio recording of the incident to ensure the deputies gave proper knock notice and that everything went according to department policy. **Exhibit KK** (Evans 14:24-15:1, 62:23-63:1, 63:4-25, 64:11-15). According to Evans, everything

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| | went according to Sheriff's Department policy. **Exhibit KK** (Evans 95:21-25). |
| 75. The deputies received extensive training prior to and during their tenure with the Los Angeles Sheriff's Department in compliance with the established standards for California peace officer training (POST standards). Walker Decl., ¶¶25-26; Messer. Decl., ¶¶2-4 and 13. | 75. Undisputed that the deputies received training. |

[Certificate Of Service Omitted In Printing]

[ER 1403] **ROBERT MANN**
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**UNITED STATES DISTRICT COURT**

**CENTRAL DISTRICT OF CALIFORNIA**

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| AUGUSTA MILLENDER, BRENDA MILLENDER, WILLIAM JOHNSON,<br>Plaintiffs,<br>vs.<br>COUNTY OF LOS ANGELES,<br>Defendants. | Case No. CV 05-2298 DDP (RZx)<br>**PLAINTIFFS' OBJECTION TO DECLARATIONS OF DEFENDANT CURT MESSERSCHMIDT, DEFENDANT SCOTT WALKER AND SANDRA HUTCHENS**<br>[October 2, 2006]<br>**Date: 10/23/06**<br>**Time: 10:00 a.m.**<br>**Ctrm: 3** |

Plaintiffs hereby object to the Declaration of Sandra Hutchens, defendant Messerschmidt and defendant Walker, filed by defendants in support of their motion for summary judgment. Plaintiffs object on the following grounds:

**Declaration of Sandra Hutchens**

Ms. Hutchens is apparently Chief of Homeland Security Division of the Sheriff's Department. Objection. Improper legal opinion, no foundation, so vague and imprecise as to be irrelevant. There is no foundation that Hutchens is an expert on the Constitution, or with regard to any other matter about which she offers her opinion.

There is no showing of on what Hutchens bases her opinion. For any opinion to [ER 1404] be admissible, the declarant must establish an adequate foundation. If offered as a lay opinion, it is clearly inadmissible, for it is not the type opinion a lay witness is permitted to give. *Federal Rules of* Evidence, Rule 701.

If offered as an expert opinion, it is inadmissible because Hutchens' declaration fails to establish any facts which would qualify her as an expert competent to render the opinion she offers, or the facts upon which she bases her opinion. *Federal Rules of Civil Procedure*, Rule 26(a)(2). Hutchens is not qualified to render an opinion that Sheriff's Department policy "prohibited peace officers from conducting unconstitutional searches and/or seizes, from using excessive force, or from otherwise violating the civil rights of any person." Before a person is permitted to testify as an expert as to a given subject matter, he or she must of course establish the requisite expertise in that area. *Federal Rules of Evidence*, Rule 702. Hutchens does not show that she is an expert on constitutional

rights. There is nothing inherent in Hutchens' position which makes her an expert on the Constitution. A constitutional scholar, for example a judge, might qualify himself or herself as an expert on what rights the Constitution protects; Hutchens does not purport to be a constitutional scholar, judge, or lawyer.

Moreover, Hutchens provides absolutely no clue what the basis for her opinion is. It is therefore impossible to determine whether the factual basis is "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject." *Federal Rules of Evidence*, Rule 703.

Lastly, the declaration does not address everything which may potentially cause a constitutional violation. For example, although it may be the County's official policy not to violate people's constitutional rights, nevertheless, people's constitutional rights may be violated because the County has a policy of doing nothing when their deputies violate people's rights, such as when the tape recording of a SWAT entry indicate deputies unlawfully entered a home by failing to give proper knock-notice and no one investigates the possibility and no one is questioned more specifically about what happened and no one it [sic] re-trained or disciplined in any way. Or when three supervisors look at a warrant [ER 1405] affidavit and they all approve it, although it clearly demonstrates a lack of probable cause. Plaintiffs object to the Hutchens declaration in its entirety. Plaintiffs request the declaration be stricken.

**Declaration of Curt Messerschmidt**

Plaintiffs object to the following paragraphs and request they be stricken:

¶2: Objection: irrelevant. Defendants had no evidence Bowen's crime was associated with his alleged gang membership.

¶3: Objection: irrelevant. Defendants had no evidence Bowen's crime was associated with his alleged gang membership.

¶4: Objection: irrelevant. Defendants had no evidence Bowen's crime was associated with his alleged gang membership.

¶5: Objection: hearsay

¶7: Objection: hearsay

¶7a: Objection: hearsay, misstates the evidence (Kelley never said Bowen tried to throw her over the balcony, see Exhibit C tape and transcript)

¶8: Objection: hearsay

¶9: Objection: hearsay

¶10: Objection: hearsay

¶11: Objection: hearsay, Best Evidence Rule, no foundation, Harvey/Madden Rule (*People v. Harvey*, 156 Cal.App.2d 516 (1958); *People v. Madden*, 2 Cal.3d 1017 (1970)).

¶12: Objection: hearsay; misstates the evidence. According to defendants' meet and confer letters

(Exhibit JJ) Messerschmidt allegedly verified with the mailman that Bowen was not living at the 97th Street address. The Declaration does not say he spoke to the mailman. Also irrelevant because this information was not in the affidavit.

¶13: Objection: hearsay; misstates the evidence. Kelly did not say Bowen was residing at the 120th Street address. **Exhibit C** (tape and transcript)

¶14: Objection: hearsay, Best Evidence Rule, no foundation, Harvey/Madden Rule [ER 1406] (*People v. Harvey*, 156 Cal.App.2d 516 (1958); *People v. Madden*, 2 Cal.3d 1017 (1970)), misstates the evidence.

¶16: Objection: irrelevant

¶17: Objection: irrelevant.

¶18: Objection: irrelevant, hearsay.

¶19: Objection: irrelevant

¶21: Objection: hearsay, Best Evidence Rule, no foundation, Harvey/Madden Rule *(People v. Harvey*, 156 Cal.App.2d 516 (1958); *People v. Madden*, 2 Cal.3d 1017 (1970)), misstates the evidence. Also irrelevant because this information was not in the affidavit.

¶22: Objection: hearsay, Best Evidence Rule, no foundation, Harvey/Madden Rule (*People v. Harvey*, 156 Cal.App.2d 516 (1958); *People v. Madden*, 2 Cal.3d 1017 (1970)), misstates the evidence.

¶23: Objection: hearsay, Best Evidence Rule, no foundation, Harvey/Madden Rule (*People v. Harvey*, 156 Cal.App.2d 516 (1958); *People v. Madden*, 2 Cal.3d 1017 (1970)), misstates the evidence.

¶24: Objection: hearsay.

¶25: Objection: hearsay, Best Evidence Rule, no foundation, Harvey/Madden Rule (*People v. Harvey*, 156 Cal.App.2d 516 (1958); *People v. Madden*, 2 Cal.3d 1017 (1970)), misstates the evidence, irrelevant as to his subjective thoughts.

¶26: Objection: hearsay, Best Evidence Rule, no foundation, Harvey/Madden Rule (*People v. Harvey*, 156 Cal.App.2d 516 (1958); *People v. Madden*, 2 Cal.3d 1017 (1970)), misstates the evidence, irrelevant as to his subjective thoughts.

¶27: Objection: hearsay, Best Evidence Rule, no foundation, Harvey/Madden Rule (*People v. Harvey*, 156 Cal.App.2d 516 (1958); *People v. Madden*, 2 Cal.3d 1017 (1970)), misstates the evidence, irrelevant as to his subjective thoughts.

¶29: Objection: hearsay, Best Evidence Rule, no foundation, Harvey/Madden Rule (*People v. Harvey*, 156 Cal.App.2d 516 (1958); *People v. Madden*, 2 Cal.3d 1017 [ER 1407] (1970)), misstates the evidence, irrelevant as to his subjective thoughts.

¶32: Objection: Messerschmidt cannot state what happened at the front door because he did not hear or see it. **Exhibit X** (Messerschmidt 85:1-4 ("I'm not a hundred percent of what time they played it

because I was positioned north and east from the front of the house, so I didn't actually have the entry team in my sight."; 87:5-9 ("Q. Could you hear what was happening at the front door? A. I heard banging. Q. Anything else? A. No. 'Cause the announcements were so loud.")). "A party cannot create an issue of fact by a declaration contradicting his or her own deposition or other sworn testimony." Schwarzer, *et al.*, Federal Civil Procedure Before Trial, ¶ 14.166 at p. 14-50, citing *Cleveland v. Policy Management Systems Corp.*, 526 U.S. 795, 806, 119 S.Ct. 1597, 1603-1604 (1999); *School Din. No. 1J, Mujltnomah County v. AcandS, Inc.*, 5 F.3d 12255, 1264 (9th Cir. 1993).

¶33: Objection: speculation, hearsay

¶35: Objection: misstates the evidence, irrelevant as to his subjective belief about what the letter shows

**Declaration of Scott Walker**

Plaintiffs object to the following paragraphs and request they be stricken:

¶3: Objection: hearsay, misstates the evidence. There is no evidence that Bowen "was known to routinely carry a sawed off shotgun." "A party cannot create an issue of fact by a declaration contradicting his or her own deposition or other sworn testimony." Schwarzer, *et al.*, Federal Civil Procedure Before Trial, ¶ 14.166 at p. 14-50, citing *Cleveland v. Policy*

*Management Systems Corp.*, 526 U.S. 795, 806, 119 S.Ct. 1597, 1603-1604 (1999); *School Dist. No. 1J, Mujltnomah County v. AcandS, Inc.*, 5 F.3d 12255, 1264 (9th Cir. 1993).

¶4: Objection: hearsay, irrelevant as to his subjective belief.

¶5: Objection: hearsay, Best Evidence Rule

¶6: Objection: hearsay, Best Evidence Rule

[ER 1408] ¶8: Objection: hearsay, Best Evidence Rule, no foundation, Harvey/Madden Rule (*People v. Harvey*, 156 Cal.App.2d 516 (1958); *People v. Madden*, 2 Cal.3d 1017 (1970)), misstates the evidence.

¶10: Objection: hearsay

¶12: Objection: hearsay, irrelevant as to his subjective beliefs

¶13: Objection: misstates the evidence, Best Evidence Rule, **Exhibit L** (recording of entry); "A party cannot create an issue of fact by a declaration contradicting his or her own deposition or other sworn testimony." Schwarzer, *et al.*, Federal Civil Procedure Before Trial, ¶ 14.166 at p. 14-50, citing *Cleveland v. Policy Management Systems Corp.*, 526 U.S. 795, 806, 119 S.Ct. 1597, 1603-1604 (1999); *School Dist. No. 1J Mujltnomah County v. AcandS, Inc.*, 5 F.3d 12255, 1264 (9th Cir. 1993).

¶14: Objection: misstates the evidence, Best Evidence Rule, Exhibit L (recording of entry); "A party cannot create an issue of fact by a declaration

contradicting his or her own deposition or other sworn testimony." Schwarzer, *et al.*, Federal Civil Procedure Before Trial, ¶ 14.166 at p. 14-50, citing *Cleveland v. Policy Management Systems Corp.*, 526 U.S. 795, 806, 119 S.Ct. 1597, 1603-1604 (1999); *School Dist. No. 1J, Mujltnomah County v. AcandS, Inc.*, 5 F.3d 12255, 1264 (9th Cir. 1993).

¶ 16: Objection: irrelevant as to who was in each room and speculation

¶17: Objection: misstates the evidence: there is no evidence Walker was "unable to acquire keys from the occupants."

DATED: October 2, 2006

**ROBERT MANN**
**DONALD W. COOK**
Attorneys for Plaintiffs

By /s/ [Illegible]
Donald W. Cook

[ER 1678] UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

AUGUSTA MILLENDER, BRENDA MILLENDER, WILLIAM JOHNSON,

Plaintiffs,

v.

COUNTY OF LOS ANGELES, ET AL.,

Defendants.

Case No. CV 05-2298 DDP (RZx)

**ORDER (1) GRANTING IN PART AND DENYING IN PART PLAINTIFFS' NOTICE OF MOTION AND MOTION FOR SUMMARY ADJUDICATION; (2) GRANTING IN PART AND DENYING IN PART INDIVIDUAL DEFENDANTS' NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT AND/OR SUMMARY ADJUDICATION OF ISSUES; and (3) GRANTING IN PART AND DENYING IN PART MUNICIPAL DEFENDANTS' NOTICE OF MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, FOR SUMMARY ADJUDICATION OF ISSUES**

(Filed Mar. 15, 2007)

[Motions filed on September 18, 2006]

This matter comes before the Court on: (1) Plaintiffs' Notice of Motion and Motion for Summary Adjudication ("P's MSJ"); (2) Individual Defendants' Notice of Motion and Motion for Summary Judgment and/or Summary Adjudication of Issues ("ID's MSJ"); and (3) Municipal Defendants' Notice of Motion and Motion for Summary Judgment or, in the Alternative, for Summary Adjudication of Issues ("MD's MSJ"). After reviewing and considering the materials [ER 1679] submitted by the parties and hearing oral argument, the Court adopts the following order.

## I. Background

On March 28, 2005, Augusta Millender, Brenda Millender and William Johnson (collectively referred to as "Plaintiffs") filed a Civil Rights Complaint with State Law Claims ("Compl.") against The County of Los Angeles, the Los Angeles County Sheriff's Department, and Sheriff Leroy Baca (collectively referred to as "Municipal Defendants"), and 27 Los Angeles County deputies[1] (collectively referred to as "Individual Defendants"). Specifically, Plaintiffs' complaint includes three causes of action under 42 U.S.C. § 1983 for violations of the Fourth and Fourteenth

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[1] While, at one time, there were 27 individual deputy Defendants, 16 of them have been terminated from the Complaint. Therefore, the following 11 Individual Defendants remain: Jack Demello, Robert J. Lawrence, Curt Messerschmidt, Donald Nichiporuk, David O'Sullivan, Rick Rector, James Ritenour, Richard Schlegel, Ian Stade, Brice Stella, and Scott Walker.

Amendments and for conspiracy to deprive them of their civil rights based on their race (including *Monell* claims against the County of Los Angeles and the Sheriff's Department, and supervisorial liability claims against Sheriff Baca in his official and individual capacities). The Complaint also includes supplemental claims for: violations of the California Constitution; violations of civil rights under *California Civil Code* §§ 52.1 & 51.7; negligence; and conspiracy. Plaintiffs allege the following in their Complaint.

Plaintiffs allege that the violations of their rights caused Plaintiffs special and general damages, physical injuries and extreme emotional distress including, but not limited to, fright, [ER 1680] shock, embarrassment, anger and other emotional distress. (Complaint ¶ 22). Augusta Millender was hospitalized, and Brenda Millender and William Johnson moved. (*Id.*)

## II. Statement of Facts

Unless otherwise noted, the following facts are undisputed:

Augusta Millender ("Mrs. Millender") was 73 years old on November 6, 2003 and was being treated for diabetes and high blood pressure. (Plaintiffs' Statement of Uncontroverted Material Facts and Conclusions of Law ("P's SUF"), No. 1). She also had metal pins in her femur and used a walker. (*Id.*) On November 6, 2003, Mrs. Millender was living with her 47 year-old daughter, Brenda, who was being

treated for high blood pressure and insulin-dependent diabetes. (P's SUF No. 2). On November 6, 2003, Mrs. Millender's grandson, William Johnson, who was Brenda's son, was also living at the house with Mrs. Millender and Brenda. (P's SUF No. 3). He was 20 years old at the time. (*Id.*) The Millenders lived at 2234 East 120th Street in Los Angeles, California (the "120th Street Address" or the "Millender Residence"). (P's SUF No. 4).

In 1982, Mrs. Millender first met her foster son, Jerry Bowen, who was 13 years old. (P's SUF No. 5). He lived with her until he was about 19 years old, which would have been 1987 or 1989. (*Id.*) The next time Bowen stayed at Mrs. Millender's home was from January or February to March of 2003, when he stayed there only temporarily. (P's SUF No. 6; Individual Defendants' Statement of Material Uncontroverted Facts and Conclusions of Law ("ID's SUF") No. 10). When Bowen stayed at the house in 2003, he stayed in the back house, not in the main house. (P's SUF No. 7). Because, at [ER 1681] that time, Bowen did not have a regular address, he received mail from the State of California and/or the County of Los Angeles at the 120th Street Address. (P's SUF No. 8; ID's SUF No. 10).

On October 17, 2003, while Shelly Kelly was moving out of her apartment at 1425 W. 97th Street in Los Angeles ("the 97th Street Address"), Bowen assaulted her. (P's SUF No. 11; ID's SUF No. 1). Due to Bowen's violent tendencies and some prior physical assaults on her, Kelly had called the Sheriff's

Department to stand by while she moved her belongings out of her apartment. (ID's SUF No. 2). Approximately twenty minutes after the deputies arrived, they were called away on an emergency of a child not breathing. (ID's SUF No. 3).

Kelly stated that, as soon as the deputies left the location, Bowen appeared and the altercation began. (*Id.*) Bowen bit Kelly and attempted to push her down the stairs. (ID's SUF No. 1). Kelly managed to get away from Bowen. (P's SUF No. 12). Bowen grabbed Kelly by the front of her shirt with both of his hands. (ID's SUF No. 3). He also grabbed Kelly by the hair and tried to pull her into the residence. (*Id.*) Kelly straddled the doorway with her legs to keep him from pulling her inside. (*Id.*) Bowen then grabbed both of her arms, at which time she was able to pull out of her shirt and run to her vehicle. (ID's SUF No. 4). Bowen went into the apartment and came back out with a sawed-off shotgun with a pistol grip. (*Id.*) He stood in front of Kelly's vehicle and told her he would kill her if she left. (*Id.*) Kelly laid down on her seat and "punched it." (*Id.*) As she drove away in her car, Bowen shot at her with the black sawed-off shotgun. (P's SUF NO. 12; ID's SUF Nos. 1 & 4). Kelly located police officers a short [ER 1682] time later. (ID's SUF No. 4). When they later interviewed Kelly about the incident, deputies immediately recognized her and the location as the same individual and address they had left earlier. (ID's SUF No. 5). Kelly provided the deputies with four photographs of the suspect to aid them in their investigation. (*Id.*)

Curt Messerschmidt was the detective assigned to the case, and he eventually authored a search warrant affidavit. (P's SUF No. 14; ID's SUF No. 6). Before meeting with Kelly, Messerschmidt reviewed the incident report and a supplemental report prepared by Deputy Hector Garcia regarding the assault incident. (ID's SUF No. 6).

On October 22, 2003, Messerschmidt met with Kelly at the Lennox Sheriff's station, reviewed the incident report, and verified the facts of the incident with her. (ID's SUF Nos. 8 & 13). During her interview, Kelly told Messerschmidt that Bowen did not live at the 97th Street Address and was staying at the 120th Street Address. (*Id.*) She also told Messerschmidt that "if she wasn't mistaken," Bowen was "hiding out" at the Millender Residence, which was his foster mother's house. (P's SUF No. 15; ID's SUF No. 8). Messerschmidt did not ask and Kelly did not tell him why she believed this to be true. (P's SUF No. 16). Therefore, this information is not in Messerschmidt's warrant affidavit. (*Id.*) Although Kelly allegedly told Messerschmidt that she had been to the Millender Residence with Bowen prior to the assault, he did not document it. (P's SUF No. 18; Deposition of Curt Alan Messerschmidt, June 27, 2006 ("Messer. Depo."), attached as Exh. X to Declaration of Robert Mann in Support of Plaintiffs' [ER 1683] Motion for Summary Adjudication ("Mann Decl."), at 51:23-52:9). However, Mrs. Millender testified that she saw Kelly at her house on at least two occasions. (ID's SUF No. 10). Kelly did not actually use the term

residence in telling Messerschmidt where she thought Bowen could be found. (P's SUF Nos. 19 and 20). Kelly was a drug dealer for 18 years, but had been clean for 8 years before the incident with Bowen. (P's SUF No. 22).

Messerschmidt took photographs of the bruises and bite mark on Kelly. (ID's SUF No. 13). Messerschmidt also reviewed the photographs that Kelly had given the deputies. (*Id.*) Kelly identified Bowen in a "six pack" line up after signing the "Witness Admonition Mug Show Ups" form. (ID's SUF No. 14). Bowen was a known Mona Park Crip gang member. (*Id.*)

Messerschmidt prepared a supplemental report of the interview with Kelly and began doing further research to verify if the 120th Street Address was a good address for Bowen. (ID's SUF No. 16). According to his affidavit, Messerschmidt searched "departmental records, state computer records and other police agency records" to verify Bowen's address. (P's SUF No. 23). The affidavit does not state with any further specificity what databases Messerschmidt searched or what the records revealed. (*Id.*) Messerschmidt states, however, that he searched DMV records, Cal-Gangs data entries, California criminal history records and the National Criminal Index Center. (ID's SUF No. 17). He also did a computer search to verify Bowen's name, address and date of birth. (ID's SUF No. 18). He checked the Consolidated Criminal History Reporting System ("CCHRS"), which indicated that Bowen was on summary probation for a spousal battery and an

unlicensed driver [ER 1684] charge. (*Id.*) Messerschmidt checked Bowen's rap sheet/criminal history on the California Law Enforcement Teletype System ("CLETS"), which indicated Bowen's violent history and multiple felony and misdemeanor arrests. (ID's SUF No. 6).

Based upon the computer searches, the 97th Street Address was the most current, not the 120th Street Address. (P's SUF No. 24). The Department of Motor Vehicles records Messerschmidt searched indicated the most recent address for Bowen, as of September 3, 2003, was the 97th Street Address, not the 120th Street Address. (P's SUF No. 25). However, they also indicated that, as of March 27, 2003, Bowen's address was the 120th Street Address. (ID's SUF No. 18; P's SUF No. 26). Furthermore, Bowen went back to the 97th Street Address a week or two prior to the search warrant and verified that Bowen was not staying there. (ID's SUF No. 8).

The Gang Profile Records showed that, on May 17, 2003, Bowen verbally told Century deputies that his address was the 120th Street Address. (P's SUF No. 27; ID's SUF No. 18). According to a restraining order issued May 16, 2003, Bowen's address at that time was on Marvin Avenue. (P's SUF No. 28). The computer records Messerschmidt searched did not indicate Bowen's current residence address. (P's SUF No. 29).

In training, police officers are taught that the successful use of informants is critical in developing accurate information pertaining to a case. They are

taught that informants are information providers who could be a citizen victim, witness, paid informant or suspect charged with a crime. (ID's SUF No. 9). In this case, the informant was the victim, Kelly. (*Id.*)

[ER 1685] After Messerschmidt interviewed everybody and did all the computer checks, he started gathering all his information and prepared his search warrant affidavit for the issuance of an arrest warrant for Bowen and a search warrant for the 120th Street Address. (ID's SUF No. 21). Messerschmidt requested a Ramey Warrant be issued for Bowen for his involvement in the assault. (*Id.*) The warrant affidavit was reviewed and approved by Sergeant Lawrence, Messerschmidt's team sergeant at Lennox Operation Safe Streets, and Lieutenant Ornales. (*Id.*) Deputy District Attorney Janet Wilson also reviewed and app' ved the warrant. (*Id.*)

On November 3, 2003, Messerschmidt consulted with Lieutenant Maxwell of the Sheriff's Department Special Enforcement Bureau ("SEB") SWAT Team. (*Id.*) As a result of that consultation, the SEB SWAT team's Blue Team, under team leader Sergeant Walker, was requested to assist with the warrant service at the 120th Street Address. (*Id.*; ID's SUF No. 27).

Messerschmidt applied for and obtained an arrest warrant for Bowen and a search warrant for the Millender residence on November 4. (P's SUF No. 37; ID's SUF No. 26). Messerschmidt sought, and the warrant authorized, night time service. (P's SUF No.

38; ID's SUF No. 23). The warrant authorized seizure of:

> All handguns, rifles, or shotguns of any caliber, or any firearms capable of firing ammunition, or firearms or devices modified or designed to allow it to fire ammunition. All caliber of ammunition, miscellaneous gun parts, gun cleaning kits, holsters which could hold or have held any caliber handgun [ER 1686] being sought. Any receipts or paperwork showing the purchase, ownership, or possession of the handguns being sought. Any firearm for which there is no proof of ownership. Any firearm capable of firing or chambered to fire any caliber ammunition.

(Mann Decl., Exh. J). The warrant further authorized the seizure of "[a]rticles of evidence showing street gang membership or affiliation with any street gang to include but not limited to any reference to 'Mona Park Crips', including writings or graffiti depicting gang membership, activity or identity." (*Id.*) The warrant also authorized "[a]rticles of personal property tending to establish the identity of persons in control of the premise or premises." (Mann Decl., Exh J). The warrant authorized the seizure of any photographs which appeared relevant to gang membership, might depict the item being sought, or might depict any, undefined, criminal activity. (P's SUF No. 45; ID's SUF No. 25). Messerschmidt had no reason to believe Bowen's crime was a "gang" crime. (P's SUF No. 42). Defendants respond that evidence of gang affiliation is an enhancement to criminal charges.

Several days before the warrant service, the SEB SWAT personnel began the information and planning process based on the information given to them by Messerschmidt regarding the wanted suspect, warrant location, and date and time of service. (ID's SUF No. 34). The information was recorded on the SEB Activation Request – Preliminary Data Form. (*Id.*) The SEB SWAT personnel reviewed the search warrant, search warrant checklist, Bowen's criminal history, the operations plan from Messerschmidt's unit, [ER 1687] and photographs. (*Id.*) Based on this, they developed a tactical plan. (*Id.*) Walker took Bowen's criminal history and active gang membership into consideration in formulating the plan for warrant service. (*Id.*) Walker reviewed the search warrant and supporting affidavit with his team before it was served to be sure that they knew what was included in the warrant, explained the plan and briefed everybody on their assigned role. (ID's SUF Nos. 29 & 34). After the search was completed, information regarding the tactical plan was filled out in the Team Activation Packet. (ID's SUF Nos. 30 & 34). The mission for SEB personnel was "to safely execute the search warrant, detain all the occupants on the property and secure the location for investigators." (*Id.*). Once that was accomplished, the investigators would continue their investigation. (*Id.*) The "Plans to Accomplish the Mission" section of the Team Activation Packet stated that:

> Once containment personnel are in place, the entry team will approach the front of the

> location on the armored rescue vehicle. The entry team, along with the front containment team will off load from the vehicle and approach the front door. Knock and notice announcements will be given via a pre-recorded taped announcement on a PA system as well as verbal announcements at the front door. If there is no acknowledgment at the door by the occupants, the team will breach the front door and make limited penetration into the house. In addition, the window near the front [ER 1688] door will be ported so that we can provide cover for the breaching team as well as providing us the opportunity to prevent injury to occupants inside. If occupants are encountered, they will be directed towards us and lead outside to a safe area. Once the occupants are out, the team will clear the location and render it safe for the handling detectives.

(ID's SUF No. 31). The following SEB SWAT Team Blue Team personnel were assigned positions as follows: Entry Team – Walker, Rector, Nichiporuk, Schlegel, Stella, Demello, O'Sullivan and Ritenour; Containment Team – Wilber, Harris, Stade, Murray, Foisner, Bones, Geisler, Desmarteau, Parga, Hayes and Conti; Emergency medical personnel: Harrell and McCabe. (ID's SUF No. 32).

On November 4, 2003, two days before the service of the warrant, Walker drove by the Millender residence in an undercover vehicle in order to obtain photographs for the warrant service planning. (ID's SUF No. 35). He was accompanied by Deputies

Rector, Nichiporuk, Stella and Stade. (*Id.*) They took photographs and looked at the area in order to determine how they were going to serve the warrant. (*Id.*) They did not have contact with anyone from the residence on that date. (*Id.*)

On November 5, 2003, Walker, Stella, Rector and Nichiporuk drove around the area of the Millender Residence for an opportunity to arrest Bowen if they happened to see him. (P's SUF No. 31; ID's SUF No. 36). Deputies Stella and Walker contacted four to five male blacks who were shooting dice on the sidewalk directly in [ER 1689] front of the Millender Residence. (ID's No. 36). Deputies Stella and Walker spoke with the males, a couple of whom matched Bowen's general description, while Deputies Rector and Nichiporuk walked down the Millender's driveway. (*Id.*) Stella and Walker determined that Bowen was not part of the group. (*Id.*) The deputies approached the house in broad daylight without their weapons drawn. (P's SUF No. 32). Deputies Rector and Nichiporuk spoke with Mrs. Millender and Brenda on their driveway. (P's SUF No. 33; ID's SUF No. 36). Walker saw an older woman who he now believes was Mrs. Millender speaking to them, but could not here [sic] what they were saying. (ID's SUF No. 36). Walker saw another female outside who he now believes was Brenda Millender. (*Id.*) Rector talked to either Mrs. Millender or Brenda Millender and asked her about the men in front of the house. (*Id.*) The woman said she did not know the men and did not give them permission to be there. (*Id.*) The SEB deputies who were at the

Millender Residence on November 5, 2003, the day before the search warrant execution, did not document what occurred there and did not tell Messerschmidt anything about it. (P's SUF No.34).

At approximately 5:00 a.m. on November 6, 2003, the SEB Blue Team served a high-risk search and arrest warrant at 2234 E. 120th Street. (P's SUF No. 47; ID's SUF No. 28). Messerschmidt and Detective Pickett were positioned in the middle of the street to the east of the location in order to stop traffic. (ID's SUF No. 28).

The residence was occupied by the Millender Family. (ID's SUF No. 28). Mrs. Millender, Brenda and William were asleep when the deputies arrived. (P's SUF No. 48). Defendants played a pre-[ER 1690] recorded announcement over a PA system from a radio car parked in the street. (P's SUF No. 49; ID's SUF No. 39). When there was no response from the interior of the main house, Walker ordered O'Sullivan to "break and rake" the front window. (ID's SUF No. 40). Deputies also forced open the front security door. (*Id.*) As the team entered the house, they continued to identify themselves as law enforcement personnel and said that they had a search warrant. (ID's SUF No. 42). Rector, Nichiporuk and Walker were the first three through the door. (*Id.*) Upon entering the house, deputies encountered Mrs. Millender, Brenda and William, who all followed the deputies instructions and went outside to wait. (P's SUF No. 55; ID's SUF Nos. 42, 44 & 45).

The deputies proceeded to search and clear the house, which took approximately 20 minutes. (P's SUF No. 56; ID's SUF No. 49). Once the main house was cleared, the entry team went to the east side of the house and exited the kitchen, which led to the entrance of a large addition that was attached to the house but had its own outside entrance. (ID's SUF No. 49). Mrs. Millender's adult sons resided there. (P's SUF No. 57). Rector made the announcement for the people inside the addition to come out. (ID's SUF No. 49). The deputies did not forcibly enter the back house. (P's SUF No. 58). At the back house, the deputies waited for over a minute for the occupants to get dressed and come out, which all seven of them did without incident. (P's SUF No. 59; ID's SUF No. 49). None of the people in the addition are plaintiffs in this action. (ID's SUF No. 50).

Walker recorded on audio tape the entry on November 6, 2003. (ID's SUF No. 53). The SEB Team left the 120th Street Address [ER 1691] after the warrant service somewhere past 5:45 in the morning. (ID's SUF No. 54). Walker did not handcuff anyone, or have any contact with any occupants after they were directed outside of the house. (ID's SUF No. 51). He did not participate in searching the house. (*Id.*)

When exiting the house, Brenda Millender told the deputy she did not want to step outside the house onto the porch, because she was a diabetic and there was glass on the ground. One of the officers took a rug from her mother's living room and threw it over the glass. (ID's SUF No. 46). The officer who escorted

her out helped her walk across the glass. (*Id.*) Mrs. Millender, Brenda and William waited outside until the house was secured, most of the time being allowed to sit inside patrol cars because they were cold. (P's SUF No. 62; ID's SUF Nos. 45 & 48). Brenda asked a deputy for a blanket, and he gave her one. (ID's SUF No. 47). While outside, Mrs. Millender told the deputies she needed to use the restroom. (P's SUF No. 63). Because the deputies would not allow her back into the house until the SWAT Team was done clearing and securing the location, Mrs. Millender relieved herself in the street. (*Id.*; ID's SUF No. 45). For at least some portion of time, William Johnson was handcuffed. (P's SUF No. 65). During the time that Brenda and Mrs. Millender were sitting in the police cars, Brenda did not complain that she had injuries, and Mrs. Millender never told the deputies that she had to go to the hospital. (ID's SUF No. 56).

After the location was secured, the deputies brought Mrs. Millender, Brenda and William into the living room while they completed the search of the house. (P's SUF No. 64; ID's SUF No. [ER 1692] 55). Brenda was allowed to go to the restroom and to go to her room to get some shoes and a blanket. (ID's SUF No. 55). Lawrence watched the occupants in the living room. (ID's SUF No. 57). He did not apply handcuffs to anyone, or arrest anyone, and did not point his weapon at anyone. (*Id.*) Stade was assigned to containment outside the east side of [sic] house. (ID's SUF No. 57). He did not apply handcuffs to anyone, arrest anyone, or participate in the search of the residence. (*Id.*)

Faulkner, Ortega, Pickett, Valento, Cale and Bercini searched the house. (ID's SUF No. 59). When the search was over, Messerschmidt gathered the pieces of evidence being seized, had the property receipt signed and left. (ID's SUF No. 59). The deputies seized Mrs. Millender's personal shotgun, a State of California Social Services letter addressed to Bowen, and .45 caliber "American Eagle" ammunition. (P's SUF No. 66; ID's SUF No. 60).

Bowen was not found at the location. (P's SUF No. 60). Bowen's black, sawed-off shotgun was not found at the location. (P's SUF No. 61). On November 19, 2003, after the search of the Millender Residence, Messerschmidt, without SWAT assistance, arrested Bowen in the middle of the day. (P's SUF No. 36). He was hiding under a bed in a motel room occupied by Bowen and his wife, after knocking and being admitted by Bowen's wife. (*Id.*)

One of the occupants of the back house was Mrs. Millender's son, Willie Millender, who was arrested for being under the influence. (P's SUF No. 67). Criminal charges were filed against Willie Millender in *People v. Millender,* Case No. 3CM09209 in the California Superior Court of the South Central Judicial District of the County of Los Angeles. (P's SUF No. 68). Mr. Millender, [ER 1693] represented by a public defender, made a motion to suppress based upon lack of probable cause in Messerschmidt's warrant affidavit. (P's SUF No. 69). The court granted Mr. Millender's motion to quash the warrant on the grounds that the affidavit did not establish probable cause to believe

Bowen would be found at Plaintiffs' home. (P's SUF No. 70). The case was dismissed and not refiled. (*Id.*). Detective Messerschmidt was the investigator on the case. (P's SUF No. 71). Messerschmidt testified under oath in the hearing on Mr. Millender's motion to suppress. (P's SUF No. 72). The hearing transcript is 80 pages and includes direct and redirect examination of the People's witness, Messerschmidt, as well as cross examination of both Mrs. Millender and Brenda, and a closing argument. (P's SUF No. 74).

Sheriff Leroy Baca was sued in his official capacity. (Municipal Defendants Statement of Uncontroverted Facts and Contentions of Law ("MD's SUF") No. 5). Plaintiffs' complaint does not involve allegations of interference with Plaintiffs' rights "to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property." (MD's SUF No. 6). Plaintiffs' complaint does not involve allegations of interference with Plaintiffs' rights "to inherit, purchase, lease, sell, hold, and convey real and personal property." (MD's SUF No. 8). Plaintiffs allege that "wrongs" were done to them on or about November 4, 2003 or November 6, 2003. (MD's SUF No. 15).

Plaintiffs' Count Six names only the County of Los Angeles as a defendant. (MD's SUF No. 23). Plaintiffs' Count Seven names only the County of Los Angeles as a defendant. (MD's SUF No. 26).

[ER 1694] The deputies of the Los Angeles County Sheriff's Department received extensive training prior to and during their tenure in compliance with the established standards for California peace officer training (P.O.S.T. standards). (MD's SUF No. 28).

## III. Legal Standard on a Motion for Summary Judgment

Under the Federal Rules of Civil Procedure 56(c), summary judgment is proper only where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56. The moving party has the burden of demonstrating the absence of a genuine issue of fact for trial. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986). If the moving party satisfies the burden, the party opposing the motion must set forth specific facts showing that there remains a genuine issue for trial. *See id.*; Fed. R. Civ. P. 56 (e).

A non-moving party who bears the burden of proof at trial to an element essential to its case must make a showing sufficient to establish a genuine dispute of fact with respect to the existence of that element of the case or be subject to summary judgment. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Such an issue of fact is a genuine issue if it reasonably can be resolved in favor of either party.

*See Anderson,* 477 U.S. at 250-51. The non-movant's burden to demonstrate a genuine issue of material fact increases when the factual context renders her claim implausible. *See Matsushita Electrical Industrial Co. v. Zenith Radio Corp.,* 475 [ER 1695] U.S. 574, 587, 106 S. Ct. 1348, 1356 (1986). Thus, mere disagreement of the bald assertion that a genuine issue of material fact exists, no longer precludes the use of summary judgment. *See Harper v. Wallingform,* 877 F.2d 728 (9th Cir. 1989); *California Architectural Building Products, Inc. v. Franciscan Ceramics, Inc.,* 818 F.2d 1466, 1468 (9th Cir. 1987), *cert. denied,* 484 U.S. 1006 (1988).

If the moving party seeks summary judgment on a claim or defense on which it bears the burden of proof at trial, it must satisfy its burden by showing affirmative, admissible evidence. Unauthenticated documents cannot be considered on a motion for summary judgment. *See Hal Roach Studios v. Richard Feiner and Co.,* 896 F.2d 1542, 1550 (9th Cir. 1987); *Canada v. Blain's Helicopters, Inc.,* 831 F.2d 920, 925 (9th Cir.1987). A document is authenticated when it is [sic] has the proper foundation. *Canada,* 831 F.2d at 925; *Hamilton v. Keystone Tankship Corp.,* 539 F.2d 684, 686 (9th Cir.1976); *United States v. Dibble,* 429 F.2d 598, 601-02 (9th Cir.1970).

On a motion for summary judgment, admissible declarations or affidavits must be based on personal knowledge, must set forth facts that would be admissible evidence at trial, and must show that the declarant or affiant is competent to testify as to the

facts at issue. *See* Fed. R. Civ. P. 56(e). Declarations on "information and belief" are inappropriate to demonstrate a genuine issue of fact. *See Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989).

[ER 1696] **IV. Discussion**

**A. Failure to Meet and Confer**

Before discussing the merits of the Parties' cross-motions for summary judgment, the Court notes that Plaintiffs argue that Municipal Defendants' Motion must be denied in its entirety, because Defendants failed to meet and confer regarding the issues included in the Motion.[2] Central District Local Rule 7-3, ("Local Rule 7-3"), provides, in relevant part, that "counsel contemplating the filing of any motion shall first contact opposing counsel to discuss thoroughly, *preferably in person*, the substance of the contemplated motion and any potential resolution. Local Rule 7-3.

In support of their argument that Defendants failed to meet and confer regarding Municipal Defendants' Motion, Plaintiffs note that defense counsel, Trevor Grimm, sent two letters to Plaintiffs' counsel.

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[2] The specific issues in Municipal Defendants' Motion are: (1) *Monell* liability; (2) Plaintiffs' various conspiracy theories; (3) that Sheriff Baca is not a proper Defendant; (4) racial discrimination; (5) claims for damages under the California Constitution; and (6) County's alleged immunity for negligent employment and immunity under the Eleventh Amendment. (Plaintiffs' Opposition to the County Defendants' Motion for Summary Judgment ("Plaintiff's Opp."), 1:9-12).

The first letter, dated July 10, 2006, listed several grounds for Defendants' proposed motion for summary judgment, including: (1) Deputy Messerschmidt made a reasonable investigation, which gave him probable cause to believe that Bowen would be at the Millender residence; (2) the search of databases for Bowen's criminal history was a reasonable and reliable step to determine Bowen's residence; (3) Messerschmidt investigated the fact that one of the documents searched suggested that Bowen resided at the 97th Street address (Kelly's apartment); (4) the [ER 1697] fact that a state criminal court judge denied the validity of the warrant for other purposes, is not dispositive of the validity of the warrant for purposes of searching for Bowen; (5) the warrant execution was carried out in a reasonable manner; (6) there need only have been a "fair probability" that Bowen and the items to be seized were at the Millender residence; and (7) the length of time between the knock/notice and entry was reasonable. (Declaration of Donald W. Cook in Support of Plaintiffs' Opposition to Defendants' Motions for Summary Adjudication ("Cook Decl."), Exh. JJ at 49-51).

The second letter, dated August 29, 2006, repeated the first letter verbatim, but added the issue of qualified immunity for the Individual Defendants based upon their reliance on the warrant. (Cook Decl. Exh. JJ at 52-54). Thus, Plaintiffs contend that, because none of the issues in the Municipal Defendants' Motion were addressed by Defendants at any time,

Plaintiffs did not have sufficient opportunity to prepare to oppose these issues.

According to Grimm, he discussed the lack of municipal liability with Plaintiffs' counsel at the same time that Plaintiffs' counsel discussed their theories as to why there is municipal liability. (Declaration of L. Trevor Grimm in Support of Defendants Reply ("Grimm Decl."), ¶ 14). Grimm also contends in his Reply that, at the very least, these issues were discussed in detail in the context of meeting and conferring regarding Plaintiffs' Motion for Summary Judgment. (MD's Reply at 2:22-3:7).

Furthermore, as Defendants point out, Defense counsel's July 10, 2006 meet and confer correspondence advised Plaintiffs that Defendants intended to "file a motion for summary judgment for an order adjudicating this case summarily in *all* defendants' favor." [ER 1698] (Cook Decl., Exh. JJ at 49). The reasons listed in such letter go to Municipal Defendants' liability as well as the liability of Individual Defendants. (*Id.* at 49-51). Therefore, the court declines to deny Municipal Defendants' Motion for Summary Judgment on the basis of Local Rule 7-3. This Court does remind the Parties, however, that it expects full compliance with Local Rule 7-3.

### B. Probable Cause to Establish that Bowen Could be Found at the Millender Residence

Plaintiffs move for summary adjudication on their claim that the affidavit did not establish probable cause to believe that Bowen could be found at the Millender Residence.

#### 1. Collateral Estoppel

As an initial matter, Plaintiffs point out that, in *People v. Millender,* Case No. 3CM09290, the Los Angeles Superior Court quashed the warrant to search the Millender Residence, because the affidavit did not establish probable cause to believe Bowen would be found there. (Mann Decl., Exh. T at 75:6-77:14). In particular, Judge Johnson found that there was insufficient probable cause, because the affidavit referred only to the search of generic records (i.e., departmental records, state computer records and police agency records), rather than pointing to the specific records searched. (*Id.*) Because the only thing left in the affidavit was Kelly's statement, which he determined was not enough, Judge Johnson granted Defendant's motion to quash the warrant.[3] (*Id.* at

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[3] It should be noted that, at the same hearing, Judge Johnson also (1) denied Willie Millender's motion to traverse (ruling that the information supposedly left out of the affidavit would not have made a difference); and (2) denied Willie Millender's motion that the entry team violated the knock notice rules. (Mann Decl., Exh. T at 74:13-75:5).

76:2-77:6). As a result of the ruling, the [ER 1699] People were unable to proceed, and the court granted defendant Willie Millender's motion to dismiss. (*Id.* at 77:8-14). Plaintiffs indicate in their current Motion, and Defendants do not dispute, that no appeal was taken and there have been no further proceedings. (P's MSJ at 9:3). Therefore, Plaintiffs contend that Defendants are collaterally estopped from re-litigating the affidavit's sufficiency in the current Action.

The Full Faith and Credit Clause of the United States Constitution requires that federal courts "must give to a state-court judgment the same preclusive effect as would be given that judgment under the law of the State in which the judgment was rendered." *Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 80 (1984). Under California law, collateral estoppel applies if: "(1) the issue necessarily decided at the previous [proceeding] is identical to the one which is sought to be relitigated; (2) the previous [proceeding] resulted in a final judgment on the merits; and (3) the party against whom collateral estoppel is asserted was a party or in privity with a party at the prior [proceeding]." *Lombardi v. City of El Cajon*, 117 F.3d 1117, 1121 (9th Cir. 1997) (citing *People v. Sims*, 32 Cal. 3d 468, 484, 186 Cal. Rptr. 77, 87, 1651 P.2d 321 (1982)). Plaintiffs argue that "[since there was a final judgment as to one relevant, identical issue, the only question is privity." (P's MSJ at 9:15-16). The Court disagrees.

[ER 1700] Even though the Parties do not raise the question of the "finality" of the state court's

decision, the Ninth Circuit has previously held that "suppression rulings under Cal. Penal Code § 1538.5, if not followed by a conviction or an acquittal, are not final judgments under California law and therefore are without collateral estoppel effect in a subsequent civil suit."[4] *Lombardi,* 117 F.3d at 1121 (citing *Heath v. Cast,* 813 F.2d 254, 258 (9th Cir. 1987). Here, as in *Lombardi,* the criminal case against Willie Millender was dismissed before it was decided on the merits. Therefore, Willie Millender was not convicted or acquitted, and there was no final judgment for collateral estoppel purposes. Because, there was no final judgment, this Court need not address the other elements of collateral estoppel.

Defendants are not precluded from relitigating the sufficiency of the affidavit in this Court. Accordingly, Plaintiffs' Motion to this effect is denied.

### 2. Sufficiency of the Affidavit

Plaintiffs next argue that, if collateral estoppel does not preclude Defendants from re-litigating the issue, this Court must find that, as a matter of law, the affidavit did not establish probable cause. Defendants similarly move for summary adjudication

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[4] California Penal Code § 1538.5, which covers motions to suppress evidence, includes both motions to quash, Cal. Penal Code § 1538.5(a)(1)(B)(I), and motions to traverse, Cal. Penal Code § 1538.5(a) (1) (B) (iii).

on the issue of whether the affidavit was sufficient to establish probable cause.

Plaintiffs first contend that, on its face, the affidavit did not establish probable cause to believe Bowen would be found at the [ER 1701] Millender Residence. Second, Plaintiffs argue that the affidavit contained misrepresentations and that Messerschmidt omitted relevant facts, and that, therefore, Messerschmidt misled the issuing magistrate.

### a. Facial Challenge

It is undisputed that the "statement of probable cause" in the affidavit prepared and submitted by Detective Messerschmidt contained the following information relevant to the determination of Bowen's whereabouts: (1) Kelly, the victim of the physical assault allegedly perpetrated by Bowen, is Bowen's former girlfriend and identified him immediately in a "six pack" photo line up; (2) Kelly provided Messerschmidt with a current address of the suspect's residence – the 120th Street Address; (3) Kelly stated that she had been told by her neighbors that the suspect had been seen coming back to the 1425 W. 97th Street Address, where the assault occurred; (4) the affiant, Messerschmidt, conducted an extensive background search on Bowen by utilizing departmental records, state computer records, and other police agency records; and (5) based on the extensive search and information provided by the victim, Messerschmidt determined that Bowen resides at

2234 E. 120th Street in Los Angeles. (Mann Decl. Exh. J). Plaintiffs contend that, as a matter of law, this information was not enough to establish probable cause, while Defendants make the opposite argument.

*Illinois v. Gates* sets forth the appropriate standard for determining whether an affidavit provides sufficient probable cause to justify a search warrant. 462 U.S. 213 (1983). In *Gates,* the [ER 1702] United States Supreme Court applied a "totality-of-the-circumstances" analysis and held that:

> [t]he task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of the reviewing court is simply to ensure that the magistrate had a 'substantial basis for conclud[ing]' that probable cause existed.

*Id.* at 238-39. The *Gates* Court further stated that "[s]ufficient information must be presented to the magistrate to allow that official to determine probable cause" and that "his action cannot be a mere ratification of the bare conclusions of others." *Id.* at 239.

The *Gates* Court made clear that the probable cause standard is a "practical, nontechnical conception"

that deals with probabilities rather than hard certainties. *Id.* at 231. "Veracity" or "reliability" and "basis of knowledge" should be understood as "relevant considerations in the totality-of-the-circumstances analysis" such that "a deficiency in one may be compensated for, in determining the overall reliability of a tip, by a strong showing as to the other, or by some other indicia of reliability." *Id.* at 233. In *Gates,* the Court also "recognized [ER 1703] the value of corroboration of details of an informant's tip by independent police work," noting that "an officer may rely upon information received through an informant, rather than upon his direct observations, so long as the informant's statement is reasonably corroborated by other matters within the officer's knowledge." *Id.* at 242 (citations omitted). Finally, the Court emphasized the importance of deferring to the magistrate's decision regarding probable cause, stating that "we have repeatedly said that after-the-fact scrutiny by courts of the sufficiency of an affidavit should not take the form of *de novo* review," that a "magistrate's determination of probable cause should be paid great deference by reviewing courts," and that "courts should not invalidate warrants by interpreting affidavits in a hypertechnical, rather than a commonsense, manner." *Id.* at 236.

Plaintiffs argue that the affidavit did not provide probable cause for a warrant, because (1) Messerschmidt's reference to unidentified police records was inadequate in that it did not name the specific records searched and told the magistrate

nothing; and (2) Kelly's claim of residence had virtually no value, since the affidavit stated nothing about her "basis of knowledge." Defendants, on the other hand, contend that the same information did, as required by *Gates,* support a "fair probability" that Bowen would be found at the Millender Residence. Additionally, Defendants state that: (1) the computer records searched included Department of Motor Vehicles ("DMV") and Cal Gangs records; (2) Kelly told Messerschmidt that Bowen was not staying with her at the 97th Street Address and was staying with his foster mother at the 120th Street Address, and that she had been to the Millender [ER 1704] Residence with Bowen prior to the assault; and (3) Messerschmidt went to the 97th Street Address a week or two prior to the search and verified that Bowen was not staying there. While this information is certainly relevant, Plaintiffs are correct that "[i]n reviewing the validity of a search warrant, a court is limited to the information and circumstances contained within the four corners of the underlying affidavit." *United States v. Stanert,* 762 F.2d 775, 778 (9th Cir. 1985).

Considering only the information specifically included in the affidavit, this Court finds that the question of whether such affidavit supported a finding of probable cause is a very close one. Plaintiffs are correct that it would not have been difficult for Messerschmidt to question Kelly as to her exact basis of knowledge on Bowen's whereabouts and to include that information in the affidavit. Such information, if reliable, would have bolstered the affidavit. That

being said, this Court also feels that, considering Kelly's relationship to Bowen, the magistrate could have reasonably determined that her statement was reliable. Furthermore, the magistrate could reasonably have determined that Messerschmidt's statement that he had "conducted an extensive background search on the suspect by utilizing departmental records, state computer records, and other police agency records" provided adequate police corroboration. This Court disagrees with Plaintiffs that Messerschmidt's failure to specify the exact records searched renders the affidavit invalid on its face. Had the magistrate felt it necessary to know this information, he could simply have said so. Therefore, keeping in mind the statements of the *Gates* Court regarding deference to the issuing magistrate, this [ER 1705] Court finds that the warrant was, as a matter of law, facially valid.

### b. Judicial Deception

Plaintiffs next argue that, even if the affidavit was valid on its face, it is in fact, invalid because it was based on misrepresentations, in that it includes false statements and/or fails to include relevant facts. Plaintiffs contend, therefore, that Messerschmidt misled the magistrate and that, in its corrected form, the affidavit does not establish probable cause.[5]

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[5] Plaintiffs also contend that, under California law, the "corrected form" of the affidavit need not even be considered

(Continued on following page)

Defendants, on the other hand, contend that Messerschmidt did not mislead the magistrate.

In support of their contention that Messerschmidt misled the issuing magistrate, Plaintiffs argue that "Messerschmidt misrepresented what Kelly said" and that "Messerschmidt misrepresented the information in police records." (Plaintiffs' MSJ at 16:13-17:5). Plaintiffs rely on law addressing both misrepresentations and omissions.

The first misrepresentation of fact to which Plaintiffs point is Messerschmidt's statement that Kelly provided him with "a current address of the suspect *residence.*" (Mann Decl. Exh. J) (emphasis added). Specifically, during her interview with Messerschmidt, Kelly did not use the word "reside" or "residence." (Videotape of Messerschmidt's October 22, 2003 Interview with Shelly Kelly, attached as Exh. C to the Mann Decl.). Rather, she simply said that Bowen was "staying at" or "hiding out at" the [ER 1706] 120th Street Address. (*Id.*) Plaintiffs contend that a lay person cannot reliably opine as to what constitutes a residence, that even judges sometimes disagree on this question, and that Bowen did not "reside" with the Millenders. The Parties do not dispute the fact that, in the videotaped interview,

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because Messerschmidt made knowing/intentional misrepresentations.

Kelly did not actually use the word "reside"[6] (*Id.*) Thus, the question is whether Messerschmidt's use of the word "reside" was a misrepresentation that misled the magistrate.

Additionally, Plaintiffs argue that Messerschmidt misled the magistrate because (1) He did not include in the affidavit that, when asked during the videotaped interview if Bowen was staying at the 120th Street Address, Kelly responded "I believe so, if I'm not mistaken. I believe that's where he is hiding out at." (Mann Decl. Exh. C); and (2) Messerschmidt unequivocally represented that police records showed that the 120th Street Address was Bowen's "residence," rather than including that Bowen's most recent address was the 97th Street Address, that such records last associated Bowen with the 120th Street Address in May, and that the records also showed that Bowen was using a Marvin Avenue address in May.

It is undisputed that the DMV records Messerschmidt searched indicated that Bowen's most recent address, as of September 3, 2003, was the 97th Street Address where the assault occurred, and that his next most recent address was the 120th Street

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[6] Defendants have objected to Plaintiffs' submission of a transcript of the videotaped interview, which they created themselves on the grounds that the videotape itself is the best evidence. The Court notes that it does not rely on the transcript for any determinations made in this Order. Rather, the Court relies on the videotape itself, which both Parties submitted.

Address (March 27, 2003). (Mann Decl. Exh. G at 52; Messerschmidt Decl. [ER 1707] Exh. F). It is also undisputed that, according to Bowen's "Gang Member Subject File Report" in the Cal Gangs records, Bowen verbally told Century deputies on May 17, 2003, that his address was the 120th Street Address. (Mann Decl. Exh. G at 50; Messerschmidt Decl. Exh. G at 61). Similarly, Bowen's Consolidated Criminal History Reporting System ("CCHRS") record indicated that the Millender Residence was his address as of May 17, 2003. (Mann Decl. Exh. G at 64). Finally, Messerschmidt also checked the County Warrant System and found documentation of a restraining order issued on May 16, 2003. That printout indicated an address of 2303 South Marvin Avenue. (Mann Decl. Exh. G at 44; Messerschmidt Depo. at 62:16-63:11). None of this information was included in the affidavit. Thus, Plaintiffs ask this Court to find that the affidavit did not establish probable cause that Bowen could be found at the Millender Residence, and the search was, therefore, unreasonable in violation of the Fourth Amendment to the United States Constitution and California Constitution Article I, section 13.

### (1) *The Federal Standard*

As discussed above, Plaintiffs argue that Messerschmidt submitted false and misleading information in, and/or omitted relevant information from, his affidavit to the magistrate, who then relied

upon that information, or lack thereof, in finding probable cause for the search warrant. To prove such a claim under federal law, Plaintiffs "must make (1) a substantial showing of deliberate falsehood or reckless disregard for the truth, and (2) establish that but for the dishonesty, the challenged action would [ER 1708] not have occurred." *Butler v. Elle,* 281 F.3d 1014, 1024 (9th Cir. 2002).

"In this variety of Fourth Amendment case, alleging judicial deception in the procurement of a search warrant, we confront a situation where . . . a state-of-mind question is embedded in the underlying constitutional issue, i.e., whether or not in allegedly omitting relevant information from his affidavit in support of the application for a search warrant," Messerschmidt acted "with deliberate falsehood or reckless disregard for the truth." *Id.* The question of "state of mind" is one of fact, while the question of materiality, whether the warrant would have in fact been issued in light of these false statements and/or omissions, is one of law for the court. *Id.* at 1025-26.

*False Statements and/or Omissions*

The first question that this Court must answer is whether there were, in fact, misrepresentations and/or omissions. Plaintiffs first argue that Messerschmidt made a misrepresentation by using the word "reside" or "residence" in the affidavit. Plaintiffs acknowledge that the legal definition of residency may be complicated, but argue that the

basic concept is not. In support of their position, Plaintiffs point to the standard dictionary definitions of "reside" and "resident." Plaintiffs' focus on the technical definition of these words is a red herring. While Kelly may not actually have used the word "reside," she confirmed that Bowen was "staying at" or "at" the 120th Street Address. At one point in particular during the interview, Kelly confirmed without hesitation, after explaining that Bowen did not live at the 97th Street Address, that he was at the 120th Street [ER 1709] Address – his foster mother's house. (Mann Decl. Exh. C). Considering all of the undisputed evidence in the light most favorable to Plaintiffs, the Court finds that the terms "reside" and "residence" are sufficiently ambiguous such that Messerschmidt's use of them does not, as a matter of law, amount to a false statement or a misrepresentation.[7]

The remainder of the misrepresentations and/or omissions of which Plaintiffs complain relate to the fact that Messerschmidt failed to include certain information in the affidavit. For instance, Plaintiffs point to the undisputed fact that Messerschmidt did not include the actual words that Kelly used – "staying at," "if I'm not mistaken," and "hiding out at." Similarly, Plaintiffs contend that Messerschmidt

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[7] Even if this did amount to a false statement, the Court agrees with Defendants that Messerschmidt's use of the word "reside" rather than "staying at" was reasonable, because both clearly indicate the place where Bowen could be found.

misled the magistrate by not including in the affidavit the undisputed fact that his computer searches revealed, in addition to the 120th Street Address, more recent and alternative addresses for Bowen. Plaintiffs' argument is, in essence, that Messerschmidt misled the magistrate by making unqualified statements without representing all the facts. Therefore, these "misrepresentations" are more properly characterized as omissions than false statements. It is undisputed that Messerschmidt had this information and did not include it in the affidavit. Therefore, these were omissions as a matter of law.

[ER 1710] *State of Mind*

Next, because the Court has found that there were omissions, it must address the question of whether Messerschmidt acted with "deliberate falsehood" or "reckless disregard for the truth." If he did not act dishonestly or recklessly, then Messerschmidt's actions were reasonable, and there was no constitutional violation. *See Butler,* 281 F.3d at 1024. It appears that Plaintiffs' arguments regarding Messerschmidt's state of mind are that he had a duty to investigate further and that he knew, but failed to include, all of these facts. Thus, Plaintiffs infer that, because Messerschmidt knew the facts and did not include them and because he could have easily investigated further, but did not, Messerschmidt must have acted with "deliberate falsehood or reckless disregard for the truth." This is not enough to

establish or make a "substantial showing" as to Messerschmidt's state of mind.

In support of their Motion, Defendants submit evidence that Messerschmidt reasonably excluded the information that his computer search revealed the 97th Street Address as Bowen's most recent address, because Kelly had told him, and he had verified, that Bowen was not living there. (Messerschmidt Decl. ¶¶ 12 & 22). Defendants further argue, as discussed earlier, that Messerschmidt's use of the word "reside" rather than "staying at" or "hiding out at" was reasonable, because both clearly indicate the place where Bowen could be found.

The ultimate issue here is Messerschmidt's failure to qualify his statements with information that Kelly may have been something less than 100 percent certain as to Bowen's whereabouts and that [ER 1711] his computer searches revealed other addresses in addition to the 120th Street Address. The Court reviewed the videotaped testimony of Shelly Kelly three times before it heard the words "if I'm not mistaken." Therefore, it is quite possible that Messerschmidt did not even hear Kelly say this. Significantly, earlier in the interview, Kelly had indicated unequivocally and without hesitation, that Bowen was at the 120th Street Address. (Mann Decl. Exh. C). Additionally, Kelly had been Bowen's girlfriend for approximately six months at the time of the interview and, as a result, was in a position to have this information about him. The 120th Street Address was that of Bowen's foster mother, someone with

whom he presumably had a very close relationship. Therefore, it was a logical place for Bowen to be staying, and was the most recent address for Bowen other than the 97th Street Address, where Messerschmidt knew Bowen was not staying. Finally, at least one of the computer records searched indicated that, less than six months earlier, Bowen had, himself, reported the Millender Residence as his address.

Considering all of this undisputed evidence in the light most favorable to Plaintiffs, this Court finds that Messerschmidt acted reasonably as a matter of law. Because Messerschmidt's conduct was reasonable, it did not violate Plaintiffs' constitutional rights as a matter of law, and it is unnecessary to reach the question of materiality. Thus, as to Plaintiffs' federal claims for violation of 42 U.S.C. § 1983, the Court finds that, while there were omissions, Messerschmidt acted reasonably as a matter of law in making such omissions, such that there was no constitutional [ER 1712] violation. Accordingly, Plaintiffs' Motion as it relates to this issue is denied and Defendants' is granted.

**(2) *State Standard***

Plaintiffs argue that the same misstatements and/or omissions discussed above also violate their right to be free from unreasonable searches and

seizures under the California Constitution.[8] While the facts discussed above apply equally to this claim, the law under California state law is somewhat different. Furthermore, as the Parties' point out, the law varies slightly depending on whether we are discussing misstatements or omissions. In the case of misstatements, *People v. Cook,* 22 Cal. 3d 67, 583 P.2d 130 (1978) provides the appropriate standard, while in the case of omissions, *People v. Kurland,* 28 Cal. 3d 376, 618 P.2d 213 (1980) governs. The Court has already determined that there were no false statements in the affidavit. Therefore, the Court must only apply the law as it applies to omissions.

The *Kurland* court recognized that misstatements and omissions may not be treated in an identical manner, because "[i]ntentional omissions, unlike

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[8] It should be noted that Plaintiffs do not assert claims for violation of the California Constitution against any of the Individual Defendants. Rather, Plaintiffs name only the County of Los Angeles as a Defendant in the following claims for violation of state law: (1) Count Four – Violation of California Constitution, Article I, §§ 1,7, and 13; (2) Count Five – Violation of Civil Code Section 52.1(b); (3) Count Six – Violation of Civil Code Section 51.7; and (4) Count Seven – Negligence (Civil Code § 1714).

Therefore, this analysis under state law is only relevant to the extent that the question of whether Individual Defendants' violated Plaintiffs' constitutional rights ultimately bears on the question of whether the County is liable under *respondeat superior.* Furthermore, to the extent Plaintiffs do attempt to allege state-law claims against the Individual Defendants, they are precluded from doing so by the allegations of their Complaint.

the intentional misstatements considered in *Cook,* [ER 1713] are not necessarily an effort to mislead the magistrate." *Id.* at 387. Rather, "[t]hey may arise from a correct, or at least reasonable, conclusion that the omitted facts were immaterial or privileged." *Id.* *Kurland* sets forth a two-step process. First, the reviewing court must determine whether any omissions asserted are material, i.e., whether "their omission would make the affidavit substantially misleading." *Id.* at 385, 387. Second, "[i]f an omission is found material, the [fact-finder] must [ ] determine . . . whether it arose innocently or from culpable conduct." *Id.* at 387. Specifically, it must be determined "whether the material omission was either (1) reasonable, (2) negligent, or (3) recklessly inaccurate or intentionally misleading." *Id.* at 387-88. Furthermore, that "the omission itself was 'intentional' rather than inadvertent may be relevant to those issues, but may not alone be dispositive." *Id.* at 388.

Pursuant to *Kurland,* "[a] material omission is reasonable when despite the exercise of due care, [the] affiant was ignorant of the omitted fact or forgot to include it, or his conclusion that it was privileged or immaterial was reasonable even if incorrect." *Id.* Where the material omissions are determined to be reasonable, regardless of whether they were volitional or inadvertent, there is no sanction and the warrant should be left in its original form. *Id.* "Negligent omissions, on the other hand, occur when the affiant is unreasonably ignorant of facts,

unreasonably forgets to include them, or makes a good faith but unreasonable decision that they need not or should not be included." *Id.* In such a case, the omissions should be added to the affidavit and it should be retested for probable cause. *Id.* Finally, if an "affiant [ER 1714] intentionally omits any fact for the purpose of deceiving the magistrate or recklessly disregards the accuracy and completeness of the affidavit," the warrant should be quashed "regardless of whether the omission ultimately is deemed material." *Id.* at 390.

The Court reaches the same determination under California law that it reached under federal law. As previously discussed, Messerschmidt's decision to omit the facts at issue here was reasonable as a matter of law. Because the omissions were reasonable, the Count [sic] need not reach the issue of materiality. Accordingly, Plaintiffs' Motion as it relates to the claims pursuant to the California Constitution is denied and Defendants' Motion to the same effect is granted.

### 3. Qualified Immunity as to Messerschmidt

Defendants have also moved for summary adjudication of the issue on the grounds that Messerschmidt is entitled to qualified immunity

on the federal claims.[9] Because the Court has already determined that Messerschmidt acted reasonably and that there was no constitutional violation, the issue of qualified immunity as it [ER 1715] relates to probable cause to believe that Bowen could be found at the Millender Residence is moot.

### C. Nighttime Service

Plaintiffs move this Court to summarily adjudicate the question of whether the affidavit was insufficient to support nighttime service. Defendants also move for summary adjudication of this issue, arguing that the facts in the affidavit did, as a matter of law, justify nighttime service.

California Penal Code § 1533 provides as follows: "Upon a showing of good cause, the magistrate may, in his or her discretion, insert a direction in a search

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[9] In their Opposition, Plaintiffs state that "[q]ualified immunity is not a defense to the Millenders' state law claims (violations of the California Constitution, Article I, §§ 1, 7 & 13, *California Civil Code* §§ 52.1(b) and 51.7, negligence and conspiracy). (Plaintiffs' Opp. at 14:26-15:1). Specifically, they cite *Ogborn v. City of Lancaster* for the proposition that "[t]he doctrine of qualified governmental immunity is a federal doctrine that does not extend to state court claims against government employees." 101 Cal. App. 4th 448, 460 (2002).

Once again, this Court notes that Plaintiffs bring such state claims against the County only under a theory of *respondeat superior*. (*See* Complaint ¶¶ 27-31). Thus, the Individual Defendants' arguments that they are entitled to qualified immunity pertain only to the federal claims brought against them.

warrant that it may be served at any time of the day or night. In the absence of such direction, the warrant shall be served only between the hours of 7 a.m. and 10 p.m." Cal. Penal Code § 1533 (West 2000). Section 1533 further states that "[w]hen establishing 'good cause' under this section, the magistrate shall consider the safety of the peace officers serving the warrant and the safety of the public as a valid basis for nighttime endorsements." *Id.*

"The proper standard for 'good cause' as specified in Penal Code section 1533 is as follows: the affidavit furnished the magistrate must set forth specific facts which show a necessity for service of the warrant at night rather than between the hours of 7 a.m. and 10 p.m." *Tuttle v. Superior Court,* 120 Cal. App. 3d 320, 327-28 (1981) (citing *People v. Watson,* 75 Cal. App. 3d 592, 598 (1977)). Furthermore, "[a]llegations in an affidavit with respect to safety of officers must inform the magistrate of specific facts showing why nighttime service would lessen a possibility of violent confrontation, e.g. that the particular defendant is prepared to [ER 1716] use deadly force against officers executing the warrant." *Id.* at 239.

It is undisputed that the magistrate endorsed the warrant for night service (Mann Decl. Exh. J at 88), and that the sworn affidavit includes the following language in specific support of Messerschmidt's request for night service:

> Your Affiant request [sic] that this Search Warrant be endorsed for night service due to

> the fact that the investigation has shown that the primary suspect in this case has gang ties to the Mona Park Crip gang based on information provided by the victim and the cal-gang database. Also your Affiant believes the nature of the crime (Assault with a deadly weapon) goes to show that night service would provide an added element of safety to the community as well as for the deputy personnel serving the warrant, based on the element of surprise.

(*Id.* at 97). In deciding whether a nighttime search is justified, a magistrate need not "rely solely upon the facts the affiant expressly articulates as being those which justify nighttime service." *People v. Lopez,* 173 Cal. App. 3d 125, 138 (1985). "Instead, the magistrate reviews the entire affidavit, as well as any other evidence properly before him, in determining whether sufficient specific facts exist which reveal a necessity for nighttime service." *Id.* Thus, the following information which is undisputedly included in the sworn affidavit, should also be [ER 1717] considered in determining whether night service was justified: (1) that the alleged crimes were spousal assault and assault with a deadly weapon (Mann Decl. Exh. J at 94); (2) that the suspect had a violent temper and nature (*Id.*); (3) that the suspect had committed "some previous physical assaults" on the victim (*Id.*); and (4) that the suspect utilized a "black sawed off shotgun with a pistol grip" in the commission of the crime, which he fired at the victim and/or her car five times (*Id.* at 95).

Plaintiffs argue that this information was not enough to justify night service because the allegations regarding officer safety were not specific enough. In particular, Plaintiffs argue that the affidavit was insufficient, because it did not include specific facts that Bowen was likely to use force *against officers* as required by *Tuttle*. In support of this argument, Plaintiffs cite Messerschmidt's deposition testimony that he had "no specific information . . . that Bowen would be a threat to the officers." (Mann Decl., Exh. X at 120:11-121:18). This argument is unpersuasive.

*Tuttle* did not require that an affiant provide specific facts or evidence of violence or a tendency of violence against officers. The facts in the affidavit, that Bowen physically assaulted his girlfriend, shot at his girlfriend with a black sawed-off shotgun, had violent tendencies, had assaulted his girlfriend in the past, and was a member of the Mona Park Crip gang, were sufficient to show the likelihood that he would also use violence against officers.

Plaintiffs further argue that the fact that deputies later arrested Bowen at a motel during the day shows that night service [ER 1718] was not justified. However, the facts as to how Bowen's arrest was ultimately achieved do not bear on whether the issuance of a warrant for night service was justified. Plaintiffs' argument that deputies went to the Millender Residence in broad daylight and spoke with Mrs. Millender and Brenda is equally unavailing.

Finally, the cases upon which Plaintiffs rely in support of their argument are not convincing. In *Tuttle,* unlike this case, the only facts in the affidavit were the nature of the contraband (marijuana) and the type of crime (cultivation). The only reference to firearms was general in nature, that "instances of escape and carrying of firearms are becoming more common in the service of search warrants on remote cultivation sites in California." *Tuttle,* 120 Cal. App. 3d at 328. None of the facts included were specific to the suspect at issue. Plaintiffs also cite *United States v. Nielson* for the proposition that Bowen's affiliation with a "gang," and the fact that he was accused of assaulting his girlfriend with a deadly weapon were insufficient to justify night service. 415 F.3d 1195 (10th Cir. 2005). *Nielson* does not support this proposition. In fact, the issue of night service is not even mentioned in *Nielson,* which deals with the question of whether police were justified in making a "no-knock" entry to execute a warrant. *Id.*

Based on the foregoing, this Court finds that the facts specified in the sworn affidavit were sufficient to justify issuance of a warrant endorsed for night service. Accordingly, this Court denies Plaintiff's Motion and grants Defendants' Motion in this regard.

[ER 1719] **D. Probable Cause to Search For and Seize the Items Specified in the Warrant**

Plaintiffs and Defendants each move for summary adjudication on the question of whether the

warrant established probable cause to search for the items specified in the warrant. It is undisputed that "Attachment 2" to the Search Warrant contained the following language in regards to the property to be searched for and seized:

> All handguns, rifles, or shotguns of any caliber, or any firearms capable of firing ammunition, or firearms or devices modified or designed to allow it to fire ammunition. All caliber of ammunition, miscellaneous gun parts, gun cleaning kits, holsters which could hold or have held any caliber handgun being sought. Any firearm for which there is no proof of ownership. Any firearm capable of firing or chambered to fire any caliber ammunition.
>
> Articles of evidence showing street gang membership or affiliation with any Street Gang to include but not limited to any reference to 'Mona Park Crips,' including writings or graffiti depicting gang membership, activity, or identity. Articles of personal property tending to establish the identity of persons in control of the premises. Any photographs or photograph albums depicting persons, vehicles, weapons or locations, which may appear relevant to gang [ER 1720] membership, or which may depict the item being sought and or believed to be evidence in the case being investigated on this warrant, or which may depict evidence of criminal activity. Additionally to include any gang indicia that would establish the persons being sought in

> this warrant, affiliation or membership with the 'Mona Park Crips' street gang.

(Mann Decl. Exh. J at 91).

"In order for a search to be reasonable, the warrant must be specific." *In re Grand Jury Subpoenas Dated December 10, 1987*, 926 F.2d 847, 856 (9th Cir. 1991). "Specificity has two aspects: particularity and breadth." *Id.* "Particularity is the requirement that the warrant must clearly state what is sought." *Id.* "Breadth deals with the requirement that the scope of the warrant be limited by the probable cause on which the warrant is based." *Id.*

Plaintiffs argue that the warrant was overbroad in that it authorized the seizure of articles without probable cause to believe such items were likely to be found in the Millender Residence or were related to the crime at issue. In conjunction with this argument, they contend that the warrant did not describe the items to be seized with sufficient particularity. In support of their argument, Plaintiffs point to the undisputed facts that: (1) according to the affidavit, Bowen was accused of assaulting Kelly with a deadly weapon, a specifically-described black, sawed-off shotgun with a pistol grip (Mann Decl. Exh. J at 94); (2) Defendants knew exactly what the gun looked like because Kelly gave them a photograph of Bowen with the gun (*Id.* at 95); (3) the [ER 1721] affidavit did not mention any other weapons or crimes (*Id.* at 88-97); and (4) the affidavit did not assert that Bowen's alleged gang membership had anything to do with the

crime, and Messerschmidt admitted that it did not. (*Id.*; Mann Decl. Exh. X at 119:9-120:10). Based on these facts, Plaintiffs argue that the warrant authorizing the seizure of "everything having to do with any weapon," "evidence of any crime," and "any evidence of gang paraphanalia [sic]" was not supported by probable cause. (P's MSJ at 19:9-11). Therefore, Plaintiffs contend that Defendants should not have seized Mrs. Millender's Mossberg shotgun or the .45 caliber ammunition and should not have been looking through the Millenders' family photograph albums. (*Id.* at 11-13).

Plaintiffs further argue that the authorization to search for "[a]rticles of personal property tending to establish the identity of the person in control of the premise or premises" was oppressively overbroad. (*Id.* at 19:14-15; Mann Decl. Exh. J at 91). First, Plaintiffs argue that evidence of "control of the premises" was irrelevant, and would only be relevant if "one were looking for a murder weapon but did not know who had used it" or if "one were searching a house full of contraband." (P's MSJ at 20:2-7). Plaintiffs contend that there was no question here of who used the shotgun and that, even if there were, evidence of control of the premises would not tie the gun to Bowen, only to Mrs. Millender. Plaintiffs further argue that it was quite apparent that Defendants knew that Mrs. Millender was in control of the home, because they did not take anything tending to show that; rather, "they just used the warrant as an excuse

to turn Mrs. Millender's home upside down." (*Id.* at 20:10-14).

[ER 1722] Second, Plaintiffs argue that "[g]eneric classifications in a warrant are acceptable only when a more precise description is not possible." *United States v. Hill,* 459 F.3d 966, 976 (9th Cir. 2006). Thus, Plaintiffs contend that, at the very least, "the warrant should have authorized the seizure of evidence tending to establish control of the black, sawed-off shotgun, if one were found." (P's MSJ at 20:21-23).

As an initial matter, the Court notes that, in making their argument, Plaintiffs have made several misstatements. First, the warrant did not authorize the seizure of "everything having to do with *any weapon*." Rather, its authorization was limited to firearms and things related to firearms, presumably on the grounds that a firearm was used in the commission of the alleged crime. (Mann Decl. Exh. J at 91). Second, the warrant did not authorize "evidence of any crime," but instead authorized seizure of "[a]ny photographs or photograph albums . . . which may depict evidence of criminal activity." (*Id.*) Therefore, to summarize, Plaintiffs' chief complaints are that the warrant was overbroad in its authorization of: (1) the seizure of all firearms and firearm-related items; (2) the seizure of articles of evidence showing or relevant to gang membership; and (3) the seizure of articles of personal property tending to establish the identity of persons in control of the premises.

The Ninth Circuit has made abundantly clear that "[t]he scope of the warrant, and the search, is limited by the extent of the probable cause," and that "probable cause must exist to seize all the items of a particular type described in the warrant." *In re* [ER 1723] *Grand Jury Subpoenas,* 926 F.2d at 857. Therefore, this Court must look at each of Plaintiffs' complaints.

First, as to Plaintiffs' contentions regrading [sic] the search for firearms, it is undisputed that: (1) Bowen was accused of assaulting Kelly with a specifically-described sawed-off shotgun; (2) that Kelly gave Defendants a photograph of Bowen with the shotgun; and (3) that the affidavit did not mention any other weapons or crimes. (Mann Decl. Exhs. C & J). Defendants argue that, even so, the warrant was reasonably specific, because "any caliber of shotgun or receipts would show possession of and/or purchase of guns." (Defendants' Opp. at 18:28-19:1). This argument is nonsensical and unpersuasive. The crime specified here was a physical assault with a very specific weapon. Therefore, Defendants were not entitled to search for all firearms and the warrant was overbroad in this respect.

Second, Plaintiffs argue that the authorization to seize gang-related information was overbroad, because, as Messerschmidt admitted, there was no evidence that the crime at issue was gang-related. (*See* Messerschmidt Depo. at 119:9-120:10). In response, Defendants make the unsupported statement that "[t]he photos sought re gang membership could

be linked with other gang members, evidencing criminal activity as gang affiliation is an enhancement to criminal charges." (Defendants' Opp. at 19:1-3). This argument is unconvincing. Plaintiffs are correct that California Penal Code § 186.22(b)(1) limits gang enhancements to cases where the underlying crime was gang-related. Specifically, it states that "any person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street [ER 1724] gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members," may, at the court's discretion, be punished with an additional term of two to ten years depending on the nature of the underlying crime. Cal. Penal Code § 186.22(b)(1) (West Supp. 2007). Defendants do not point to any other basis for their argument or make any additional arguments. Therefore, this Court finds that the warrant was overbroad in its authorization to seize gang-related items.

Finally, Plaintiffs argue that the warrant was overbroad in its authorization to seize evidence of who controlled the premises, because such evidence was irrelevant in that Defendants already knew that the shotgun at issue was Bowen's and evidence of who controlled the premises would only tie the gun to Mrs. Millender and not to Bowen. The Court is not convinced. Plaintiffs acknowledge that evidence of who controlled the premises would be relevant "if incriminating evidence were found and it became necessary to tie that evidence to a person." (Plaintiffs'

MSJ at 20:2-4). The mere fact that Defendants had a picture of Bowen with the shotgun and testimony of the victim, did not prevent them from, in an abundance of caution, seeking additional ways of tying Bowen to the weapon. In fact, failure to seek all potential evidence tying Bowen to the weapon would likely have subjected them to criticism as well. Finally, that Defendants may have known that Mrs. Millender owned the residence is irrelevant. Bowen, too, could have had control of the premises to some extent, such that he could have stored a weapon there. In fact, this explains why Defendants did not seize evidence that Mrs. Millender controlled the premises and only seized evidence that *tended to establish* that [ER 1725] Bowen controlled the premises.[10] Therefore, the Court finds that, as a matter of law, the warrant was not overbroad in respect to its authorization to seize evidence tending to establish who controlled the premises.

Defendants contend, though, that even if it was overbroad, the warrant was valid, because "[a]n

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[10] Plaintiffs note that Defendants did seize a letter addressed to Bowen, which they claim was not authorized, because it did not tend to establish who was "in control of the premises." Specifically, they argue that not everyone who receives mail at a location is in control of that location. While this may be true, this Court disagrees with Plaintiffs' assertion. Although ultimately it may be determined that a person receiving mail at a certain address was not in control of the premises, the receipt of mail at a certain location certainly may *tend to establish* such control.

affidavit providing more guidance than an overbroad warrant may cure the warrant's overbreadth" if "(1) the warrant expressly incorporated the affidavit by reference and (2) the affidavit either is attached physically to the warrant or at least accompanies the warrant while agents execute the search." *United States v. Bridges,* 344 F.3d 1010, 1018 (9th Cir. 2003). In support of this argument, Defendants point to the language of Attachment 2, which is set out above. That language is the very "overbroad" language to which Plaintiffs are referring and, therefore, does nothing to cure the warrant.

The Court notes that the Search Warrant does specifically incorporate Messerschmidt's "Statement of probable cause" which includes specific information about the crime at issue, the weapon used, Bowen's gang membership, etc. (Mann decl. Exh. J at 88, 94-97). However, Defendants make no effort to explain how such Statement cures the warrant's overbreadth, and this Court finds that, as a matter of law, it does not.

[ER 1726] Accordingly, this Court grants Plaintiff's Motion for Summary Adjudication on the issue of the overbreadth of the warrant as it relates to its authorization to seize all firearms and firearm-related items and all gang-related evidence. However, the Court grants Defendants' Motion for Summary Adjudication as it relates to the authorization to seize evidence tending to establish the identity of persons in control of the premises.

### E. Knock and Announce/Unlawful Entry

Plaintiffs next argue that, as a matter of law, Defendants violated California Penal Code § 1531, the California Constitution and the Fourth Amendment to the United States Constitution, because they broke into the Millender Residence without giving Plaintiffs an opportunity to open the door. Defendants, on the other hand, argue that the entry was lawful and that they are entitled to summary adjudication in that regard.

"The Fourth Amendment to the Constitution protects '[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.'" *Wilson v. Arkansas,* 514 U.S. 927, 931 (1995). The "common-law 'knock and announce' principle forms a part of the reasonableness inquiry under the Fourth Amendment," such that "the reasonableness of a search of a dwelling may depend in part on whether law enforcement officers announced their presence and authority prior to entering." *Id.* at 929, 931. Nevertheless, not "every entry must be preceded by an announcement" and "breaking is permissible in executing an arrest under certain circumstances." *Id.* at 934 (internal citations omitted). "An officer's noncompliance with the knock and announce rule is excused . . . if exigent circumstances exist." [ER 1727] *United States v. Reilly,* 224 F.3d 986, 991 (9th Cir. 2000). "Exigent circumstances are 'circumstances that would cause reasonable person to believe that entry was necessary to prevent physical harm to the officers or other persons, the

destruction of relevant evidence, the escape of the suspect, or some other consequence improperly frustrating legitimate law enforcement efforts.'" *Id.* (internal citations omitted). "The determination of exigent circumstances is a mixed question of law and fact." *Id.*

Similarly, under California law, "[t]he officer may break open any outer or inner door or window of a house, or any part of house, or anything therein, to execute the warrant, if, after notice of his authority and purpose, he is refused admittance." Cal. Penal Code § 1531 (West 2000). "An unreasonable delay in responding to a knock and announce is tantamount to a refused admittance." *People v. Hoag*, 83 Cal. App. 4th 1198, 1207 (2000). Defendants contend that they were entitled to "break in," because they were refused admittance. Plaintiffs, however, argue that this Court should reject such claim, because it is undisputed that Defendants did not give Plaintiffs sufficient time to open the door. Both Parties submitted an audio recording of the entry, which they agree took place at approximately 5:00 in the morning. (Mann Decl. Exh. L; Declaration of Scott William Walker ("Walker Decl."), ¶¶ 12 and 27 and Exh. AA attached thereto).

Based on that audio recording, Plaintiffs argue that Defendants began breaking in as soon as the pre-recorded announcement began to play. (Mann Decl. Exh. L). Walker states that the SWAT team personnel provided knock-notice both verbally and by way of a public address system, and that, after the [ER 1728] occupants failed to comply with notice and

waiting a reasonable amount of time, the team made a forcible entry. (Walker Decl. ¶¶ 13 & 14). Defendants claim that the length of time between the knock/notice and entry was reasonable, because Walker received information that there was a light on and movement in the house. (*Id.* at ¶ 12). Defendants further claim that approximately 20 seconds elapsed from the time Walker asked for the pre-recorded announcements to be started to the time when they actually gained entrance into the residence after porting the window and breaking the door. (*Id.* at ¶ 14). In response to Walker's estimate of time, Plaintiffs correctly argue that Walker's "stop" and "start" points are wrong. "The proper trigger point . . . is when those inside should have been alerted that the police wanted entry to execute a warrant." *United States v. Smith,* 63 F.3d 956, 962 (10th Cir. 1994). Furthermore, common sense and the policy behind the knock and announce requirement of avoiding needless destruction of private property, dictate that the "ending point" should be the point at which Defendants began the forcible entry. *See Hoag,* 83 Cal. App. 4th at 1211; *see also United States v. Chavez-Miranda,* 306 F.3d 973, 980 (9th Cir. 2002).

After listening to the audio tape, this Court finds that the forcible entry began somewhere between 2 and 9 seconds after the announcements began playing (and between 5 and 12 seconds after Walker called for the announcements). (Mann Decl. Exh. L; Walker Decl. Exh. AA). It is impossible to determine from the audio recording exactly when the "breaking

in" began. However, banging of some sort can be heard no more than 2 seconds after the announcements began, deputies were ordered to "break and rake" [ER 1729] (meaning break the front window) 5 seconds after the announcements began, and the window can be heard breaking 9 seconds after announcements began. (*Id.*) The first verbal announcements that can be heard (aside from the pre-recorded announcements from the PA system) come at approximately the same time as the window can be heard breaking. (*Id.*) Walker states, however, that several verbal announcements were made before he ordered the deputies to "break and rake." (Walker Decl. ¶ 13). In listening to the audio tape, background noises including voices can be heard at certain points, but it is impossible to ascertain what exactly is being said. Therefore, considering the evidence in the light most favorable to the non-moving party (in the case of Plaintiffs' Motion), it is possible that additional announcements were made, which cannot be heard on tape. Finally, the announcement that the doors were open came approximately 13 seconds after the pre-recorded announcements began. (*Id.*)

While it is true that "[t]here is no established time that the police must wait" in order to constructively infer refused admittance, "the lapse of time must be reasonable considering the particular circumstances of the situation." *Chavez-Miranda*, 306 F.3d at 980. "When evaluating reasonableness, we consider such circumstances as (1) the size and layout of the residence; (2) the time of day; (3) the nature of

the suspected offense; (4) the evidence demonstrating guilt; and (5) the officers' other observations that would support forced entry." *Id.* While it is undisputed that members of the entry team drove by the Millender Residence two days before the execution of the warrant and took photographs, there is no evidence that they knew anything about the [ER 1730] layout of the house. Therefore, this information cannot be applied in this case in order to determine how long officers should reasonably have waited before entering forcibly. As for the time of day, it is reasonable to believe that, at 5:00 a.m. the occupants would be asleep. On the other hand, it is not unheard of that people begin to wake up at this time of day in order to get ready for work. Therefore, this information is likewise not particularly helpful in this case. Defendants, however, present evidence of the final three factors in support of their position.

As to the "nature of the suspected offense" and the "evidence demonstrating guilt," it is undisputed that the underlying crime was assault with a deadly weapon, namely a sawed-off shotgun, and that the victim of the alleged crime specifically testified to that fact. (Mann Decl. Exhs. C & J). The victim also testified to the facts that Bowen had violent tendencies and had assaulted her on prior occasions. (Mann Decl. Exh. J). Finally, it is undisputed that Bowen had a violent history including multiple felony and misdemeanor arrests involving weapons (Messerschmidt Decl. ¶ 11, Exh. G), was a three-strike candidate (Messerschmidt Decl. ¶ 25), and was

a known member of the Mona Park Crips gang. (*Id.*; Mann Decl. Exhs C & J).

Additionally, Defendants argue that there was other evidence to support forced entry in that, as the entry team was approaching the house, a member of the containment team communicated by radio that he saw a light on and movement in the back of the house. (Walker Decl. ¶ 12; Deposition of Rick O'Neill Rector, August 2, 2006 ("Rector Depo."), Exh. U to Declaration of Eugene Ramirez ("Ramirez Decl."), 62:4-63:5; Deposition of John Stuart Bones, [ER 1731] August 1, 2006 ("Bones Depo."), Exh. W to Ramirez Decl. at 38:12-39:21, 41:1-23, 43:1-3; Deposition of Brice Alan Stella, August 3, 2006 ("Stella Depo."), Exh. X to Ramirez Decl., 55:19-23; County of Los Angeles Sheriff's Department Supplemental Report, attached as Exh. KK to Ramirez Decl.). Officer Bones specifically testified that he was the deputy who radioed, indicating that he saw movement at the back of the house. (Bones Depo. at 38:12-39:21, 41:1-23). He could not remember whether he also reported seeing light. (*Id.* at 43:1-3). At least three other deputies also testified that this communication was made. Based on this information, Walker inferred that someone was up and moving, potentially Bowen. He considered the possibility that the historically violent suspect would have the opportunity to arm himself,[11] and the

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[11] "[I]f an occupant is predisposed to resist an entry by police, a substantial delay between announcement and entry could only give him time to prepare." (*People v. Trujillo*, 217 Cal.

(Continued on following page)

safety of officers and other residents. Therefore, in his opinion, the circumstances became exigent. (Walker Decl. ¶ 12).

The supplemental report regarding the service of the search warrant states that "when there was no response from the interior of the main house and when containment personnel began to see movement in the addition on the east side of the house, Deputies . . . began to try to force upon [sic] the front security door." (Ramirez Decl. Exh. KK). However, Plaintiffs point out that this information was *not* included in the Team Activation Packet, which simply states the reason for forcible entry as refused admittance. (Mann Decl., Exh. K). Similarly, the communication was not [ER 1732] recorded or documented by the deputy whose job it was to document everything on the radio log. (Cook Decl. Exh. GG).

While Defendants argue that this justified the forcible entry as a matter of law, Plaintiffs contend that generic movement, without more, is not enough. *See People v. Trujillo,* 217 Cal. App. 3d 1219, 1226-27 (1990). This Court notes, however, that, in *Trujillo,* the court specifically mentioned that the movement could have been a dog whereas here Bones specifically testified that the movement was "human." Furthermore, the policy behind the knock and announce rule of preventing injury to the police or

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3d 1219, 1227 (1990) (citing *People v. Tacy,* 195 Cal. App. 3d 1402, 1420 (1987) (quoting *Bustamante-Gamez,* 488 F.2d at 11).

citizens who would react aggressively to a surprise entry is served when the police actually announce their presence. *Id.* at 1227. Even so, this Court finds that it is unable to reach a decision at this time as to whether or not the forced entry was reasonable as a matter of law. There are genuine issues of material fact that bear on this decision including, for instance, whether the "movement" appeared to be based upon knowledge of the Sheriff's Department's presence, what exactly the movement was and when exactly it occurred, when exactly Defendants began breaking in versus simply banging on the door, why the communication regarding movement at the back of the house was not documented in all relevant places, and the exact timing of various actions by deputies. The Court finds that these facts and others are in dispute and that it is necessary to hear testimony from the parties and witnesses in order to provide further information and to assess credibility.[12] Accordingly, this [ER 1733]

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[12] The Court notes that the Parties also submitted an expert report and deposition testimony indicating that the entry team acted reasonably in executing the warrant. The Court's opinion was not influenced in either direction by that evidence. Nevertheless, this evidence may be relevant in making a final determination.

Similarly, Plaintiffs make the argument that there was "evidence of improper motivation" on the part of Defendants, because when they visited the Millender Residence prior to the search, they allegedly "laughed" when Mrs. Millender told the deputies that they could come in if they had a warrant. This is not undisputed evidence, but could impact the ultimate decision as to reasonableness.

Court denies both Plaintiffs' and Defendants' Motions regarding the lawfulness of the entry.

### F. Qualified Immunity for Individual Defendants

In a suit against an officer for an alleged violation of a constitutional right, the court must consider, as a threshold matter, whether the officer is entitled to qualified immunity. *See Saucier v. Katz*, 533 U.S. 194, 200 (2001). Qualified immunity is "an immunity from suit rather than a mere defense to liability." *Id.* (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985)). The first inquiry under a qualified immunity defense is whether the facts alleged, in the light most favorable to plaintiff, show the officer's conduct violated a constitutional right. *See id.* at 201. If no constitutional right would have been violated, then the inquiry ends, and the defendant is entitled to qualified immunity. *See id.* Assuming the plaintiff clears the first hurdle of the qualified immunity defense, the second inquiry is whether the right was clearly established. *Id.* "The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violated that right." *Id.* The inquiry is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted. *See id.* Therefore, "law [ER 1734] enforcement officers are entitled to qualified immunity if they act reasonably under the circumstances, *even if* the actions result in a constitutional violation." *Wilson v. Layne*, 526 U.S. 603, 614 (1999).

The Individual Defendants move this Court for summary judgment on the issue of qualified immunity as it relates to each of Plaintiffs' federal claims against them.

### 1. Probable Cause to Believe that Bowen Would be Found at the Millender Residence

In addressing the issue of whether the affidavit established probable cause to believe that Bowen would be found at the Millender Residence, this Court determined that the affidavit was valid as a matter of law. Thus, there was no constitutional violation in this respect. Accordingly, all Individual Defendants are entitled to qualified immunity as a matter of law, and Defendants' Motion to such effect is granted.

### 2. Nighttime Service

In this Order, the Court has already considered the question of whether the facts specified in the affidavit were sufficient to justify issuance of a warrant endorsed for night service. In doing so, the court concluded that, as a matter of law, the affidavit was sufficient in this respect and that, therefore, there was no resulting constitutional violation. Accordingly, all Defendants are entitled to qualified immunity, as a matter of law, and Defendants' Motion to such effect is granted.

[ER 1735] **3. Probable Cause to Search For and Seize the Items Specified in the Warrant**

Once again, this Court has already considered the question of whether the warrant established probable cause to search for the items specified in the warrant. In doing so, this Court determined that the warrant was overbroad in its authorization to seize all firearms and firearm-related items and gang-related items. Defendants made no additional arguments as to why, even if the warrant was overbroad, the officers acted reasonably, without knowing that what they were doing was wrong. However, it is undisputed that the SWAT Defendants did not participate in the actual search for and seizure of evidence. (Walker Decl. ¶¶ 19-21, 24). Therefore, the SWAT Defendants are entitled to qualified immunity. Accordingly, Defendants' Motion is granted as it relates to SWAT Defend nts and denied as it relates to the remaining Individual Defendants.

**4. Unlawful Entry/Knock and Announce**

Defendants assert that the SWAT Defendants are entitled to qualified immunity on Plaintiffs' claims for unlawful entry, because they did comply with the knock/notice requirements and, even if there was a constitutional violation, they acted reasonably under the circumstances. Once again, the Court has discussed the issue of unlawful entry in detail and determined that questions of fact remain on a number of issues, including the alleged "movement" in the

back of the house just prior to execution of the warrant. As previously discussed, these issues also go to the "reasonableness" of the SWAT Defendants' actions in the case that a constitutional violation is found. Therefore, facts material to [ER 1736] the question of qualified immunity are in dispute. Accordingly, this Court denies Defendants' Motion as it relates to the SWAT Defendants.

The Court further notes that it is unable to find any specific allegations in regards to the other Individual Defendants, namely Messerschmidt and Lawrence, on the unlawful entry claim. Therefore, Defendants Motion on the grounds of qualified immunity is granted as it relates to Defendants Messerschmidt and Lawrence.

### 5. Unreasonable Detention/Excessive Force

Plaintiffs assert that, during the search, Defendants illegally detained them in violation of their constitutional rights, (Complaint ¶ 18), and that Defendants subjected Plaintiffs to excessive force including but not limited to pointing firearms at them. (*Id.* at ¶ 19). Individual Defendants argue that they are entitled to qualified immunity because their detention of Plaintiffs was reasonable, and they did not use excessive force. In support of this contention, Individual Defendants rely on *Muehler v. Mena,* 544 U.S. 93 (2005). In *Mena,* the United States Supreme Court held that "officers executing a search warrant [ ] have

the authority to detain the occupants of the premises while a proper search is conducted." *Id.* at 98 (internal citations and quotations omitted). The Court further explained that "the detention of an occupant is surely less intrusive than the search itself, and the presence of a warrant assures that a neutral magistrate has determined that probable cause exists to search the home." *Id.* Therefore, such detentions are appropriate "because the character of the additional intrusion caused by the detention [ER 1737] is slight and because the justifications for detention are substantial." *Id.*

Following is Plaintiffs' opposition in its entirety:

> The Millenders claim their detention was unreasonable because there was no probable cause to support the warrant in the first place, and because defendants failed to give proper knock-notice before breaking into the house. *Muehler v. Mena*, 544 U.S. 93 (2005), is distinguishable. Being required to stay outside for two hours in the cold without being able to use the bathroom was unreasonable.

(Plaintiffs' Opp. at 13:18-23). Plaintiffs first argument, therefore, is that Plaintiffs' detention was unreasonable as a matter of law (and, regardless of the particular facts), because there was no probable cause to support the warrant in the first place, and because the Entry Team violated established "knock and announce" rules. Plaintiffs are correct that *Mena*

presupposes a valid warrant. Here, though, the Court has already determined that there was probable cause to believe that Bowen was at the Millender Residence and that, therefore, the warrant was valid. Furthermore, that a triable issue of fact remains as to whether the entry was unlawful does not bear on the reasonableness of the detention. Plaintiffs, themselves, argue that they were not given sufficient time to answer the door before Defendants broke in. Thus, it is clear that Defendants ultimately would have gained entry to the Millender Residence, and Plaintiffs would have been detained.

[ER 1738] Plaintiffs' second argument in opposition to Defendants' Motion is that the detention was unreasonable, because Plaintiffs were required to stay outside for two hours in the cold without being able to use the bathroom.

In *Mena*, the court held that officers executing a search warrant may detain the occupants of the premises while conducting a proper search. *Id.* at 98. In reaching this decision, the court also held that officers may use reasonable force to effectuate the detention, including the use of handcuffs. *Id.* Thus, in *Mena*, a 2 to 3 hour detention in handcuffs was reasonable. This was particularly true where the "governmental interests in not only detaining, but using handcuffs, are at their maximum" because "a warrant authorizes a search for weapons and a wanted gang member resides on the premises." *Id.* at 100.

It is undisputed that, while they were not allowed to retrieve shoes or coats, Plaintiffs were allowed to sit in patrol cars for the majority of this time and were given blankets. One deputy even turned on the heat for Johnson. Furthermore, in reviewing the audio tape of the entry, it appears to the Court that the SWAT Defendants were very courteous to Plaintiffs. Plaintiffs do not argue otherwise. It is also undisputed that SWAT Defendants only pointed their weapons at or in the direction of Plaintiffs for a short period of time, while they were clearing and securing the premises. While Johnson was handcuffed for at least a portion of the time, Plaintiffs have not pointed to evidence of injury. Furthermore, as provided in *Mena,* Defendants were entitled to handcuff Plaintiffs during the search. It is also undisputed that the suspect sought was, in fact, a known gang member.

[ER 1739] Plaintiffs complain about the amount of time they were required to stay outside. There is some dispute on this issue. Defendants appear to argue that Plaintiffs were allowed to come into the living room once the main and back houses were secured, which was approximately 45 minutes after the initial entry. However, Plaintiffs argue that they were required to remain outside for almost two hours. Even if Plaintiffs are correct, this was not unreasonable considering that Plaintiffs were allowed to sit in patrol cars and were given blankets. Furthermore, it is undisputed that Plaintiffs were ultimately brought

back into the house while the search was still being conducted.

Additionally, Plaintiffs focus on the fact that Mrs. Millender was not allowed back into the house to go to the bathroom. Mrs. Millender simply testifies that she told an officer that she needed to use the restroom, and he told her that she could not go back into the house. Therefore, in her words, she "couldn't do anything but use the restroom in the street." (Augusta Millender Deposition, April 14, 2006, (A. Millender Depo.), 51:14-21, Exh. U to Mann Decl.). Defendants present testimony, however, that she was told she would be able to go into the house and use the restroom as soon as the house was secured. While neither party points to evidence of timing, Augusta Millender's deposition testimony appears to be that she made her request approximately 30 minutes after she was taken outside (approximately 5:30 a.m.). It is undisputed that the SWAT Defendants did not finish securing the residence until approximately 5:45 a.m. Therefore, it was not unreasonable for Defendants to require Mrs. Millender to wait until the house was secure, before returning to use the restroom. It [ER 1740] would have been unsafe to allow Mrs. Millender back into the house, before it had been secured.

Therefore, considering all of the evidence presented in the light most favorable to Plaintiffs, this Court finds that, as a matter of law, Defendants' detention of Plaintiffs was not unreasonable. Accordingly, Individual Defendants are entitled to qualified

immunity in this respect, and Individual Defendants' Motion on this issue is granted.

### 6. Unreasonable Destruction of Property

Defendants next argue that they are entitled to qualified immunity on the issue of wrongful or unreasonable destruction of property. It is undisputed that, at the very least, the following property was damaged in the execution of the search warrant: (1) "Metal security door, bent down the center with two holes, in the screen, towards the locking mechanism"; (2) "4'-6' plate glass window, broken"; and (3) "Wooden door jam and locking plate, splintered and broken." (Ramirez Decl. Exh. KK). In their Opposition, Plaintiffs contend that Defendants made a mess of the house, broke down a bedroom door even though the other door to the same bedroom was open, and broke the front door and the living room picture window.

Nevertheless, Defendants argue that they acted reasonably because "officers executing a search warrant occasionally must damage property in order to perform their duty." *Dalia v. United States,* 441 U.S. 238, 258 (1979). They contend that "only unnecessarily destructive behavior, beyond that necessary to execute a warrant effectively, violates the Fourth Amendment." *Mena v. City of Simi Valley,* 226 F.3d 1031, 1041 (9th Cir. 2000).

[ER 1741] Defendants are correct that not all destruction of property violates the Fourth Amendment. However, this Court has ruled that questions of

fact exist as to whether the SWAT Defendants violated knock and announce requirements. Therefore, it logically follows that, questions of fact exist as to whether SWAT Defendants acted reasonably in regards to the destruction of property. In other words, if the SWAT Defendants are not entitled to qualified immunity on the unlawful entry claim, then they cannot be entitled to qualified immunity on the destruction of Plaintiffs' plate glass window. Thus, Defendants Motion in this regard is denied.

Plaintiffs, however, have not made any allegations against the remaining Individual Defendants other than, potentially, that they "made a mess of the house." Plaintiffs do not provide anything more concrete. As unfortunate as it is, searches often result in messes being made, and this alone does not amount to unreasonable destruction of property. Therefore, this Court finds that the remaining Individual Defendants, namely Messerschmidt and Lawrence, are entitled to qualified immunity. Therefore, Individual Defendants' Motion in this respect is granted as to Messerschmidt and Lawrence only.

### 7. Conspiracy

In support of their argument that they are entitled to qualified immunity on Plaintiffs' conspiracy claim, Individual Defendants make the bare assertion that:

> Defendants conspired to deprive them of their Fourth Amendment rights. (Count 1.)

> The conspiracy claim fails as there is no evidence of an underlying constitutional [ER 1742] violation.

(ID's MSJ at 24:18-21). However, this Court has found that questions of fact exist as to whether there is an underlying constitutional violation. Because Defendants fail to make any further arguments regarding the conspiracy claim, summary judgment is not warranted at this time.

### G. *Monell* Claims

In Count Three of their Complaint, Plaintiffs assert that "[a]ny governmental entity defendant and any police supervisorial defendant is liable to each plaintiff for all wrongs alleged" in the Complaint under *Monell v. New York Dept. of Social Services*, 436 U.S. 658 (1978). More specifically, Plaintiffs allege that:

> Defendants County of Los Angeles, Los Angeles County Sheriff's Department, Leroy Baca and Does are alleged to have maintained or permitted an official policy or custom or practice causing or permitting the occurrence of the types of wrongs set forth herein below knowingly, with gross negligence, or with deliberate indifference and, based on the principles set forth in *Monell v. New York City Department of Social Services,* 436 U.S. 658 (1978), and *City of Canton v. Harris*, 489 U.S. 378 (1989), are liable for all injuries

> sustained by any plaintiff as set forth herein below.

(Complaint ¶ 10).

In order to sustain their *Monell* claims against the Municipal Defendants under 42 U.S.C. 1983, Plaintiffs must show that [ER 1743] Municipal Defendants had in effect a custom, policy, or practice that caused a violation of their federal constitutional rights. *Monell,* 436 U.S. at 691, 694. Evidence of a single alleged constitutional violation cannot establish a custom, policy or practice under *Monell. Oklahoma City v. Tuttle,* 471 U.S. 808, 823-24 (1985); *Nadell v. Las Vegas Metropolitan Police Dept.,* 268 F.3d 924, 929-30 (9th Cir. 2001). "Several requirements must be satisfied for a municipality to incur liability. First, the injury must amount to a constitutional deprivation." *Jackson v. Gates,* 975 F.2d 648, 654 (9th Cir. 1992). "Second, the municipality will be held to have caused an injury only when the acts which produce it were sanctioned by the municipality." *Id.* Finally, "[t]he third requirement specifies that only municipal officials who have 'final policy-making authority' may, by their actions, subject the municipality to § 1983 liability." *Id.* (quoting *Pembaur v. City of Cincinnati,* 475 U.S. 469, 480 (1986)).

Plaintiffs ask this Court to summarily adjudicate the question of whether Defendants acted pursuant to custom, practice and policy. Municipal Defendants, on the other hand, move for summary judgment on the *Monell* claims on the following grounds: (1) Plaintiffs

cannot establish *Monell* liability against them because they have failed to identify or present evidence of a constitutionally infirm policy; (2) Municipal Defendants cannot be held liable, because Individual Defendants did not commit any constitutional violations; (3) Municipal Defendants cannot be held liable, because Individual Defendants are entitled to qualified immunity; and (4) Sheriff Baca is not a proper Defendant.

[ER 1744] **1. Whether the Individual Defendants Acted Pursuant to Custom, Practice or Policy**

In support of their Motion, Plaintiffs contend that competent testimony that the conduct in question was in accord with or pursuant to the entity's customs, practices or policies is direct evidence of the entity's customs, practices or policies. *See LaLonde v. County of Riverside,* 204 F.3d 947, 961-62 (9th Cir. 2000); *see also Clipper v. Takoma Park, Maryland,* 876 F.2d 17 (4th Cir. 1989). In both of these cases, the court determined that evidence that an officer believed his actions were in accordance with custom, practice, and policy was relevant to the plaintiff's *Monell* claims. Furthermore, Plaintiffs argue that "ratification" is also evidence of custom, practice and policy. *See, e.g., McRorie v. Shimoda,* 795 F.2d 780, 784 (9th Cir. 1986) (stating that "[p]olicy or custom may be inferred if," after the questioned action, officials "took no steps to reprimand" or "otherwise failed to admit . . . conduct was in error.") Therefore, Plaintiffs submit evidence

that the Individual Defendants have acknowledged that their actions were in accordance with Department policy and claim they acted properly. Specifically, Plaintiffs point to the following testimony:

- Messerschmidt's testimony that as far as he was aware his investigation was done and his affidavit written in accordance with the training he received, and that no one ever told him otherwise. (Messerschmidt Depo. at 140:15-24);

- Walker's testimony that the actions he took prior to the execution of the warrant were in accordance with the [ER 1745] training he received, that no one ever told him otherwise, and that his training has not changed since then. (Walker Depo. at 137:19-138:22);

- Walker's testimony that the actions he took in "forcing entry" into the Millender Residence (including the amount of time he waited after the announcements, pointing a firearm at Plaintiffs, searching for people, and reporting of the warrant execution) were in accordance with his training and no one ever told him otherwise. (*Id.* at 138:23-140:25);

- Rector's testimony that his scouting of the Millender Residence, contact with the Millenders on the day before the search, forced entry into the Millender Residence, amount of time waited before breaking in, pointing of firearm in specific manner, and documentation of the execution were in accordance with the training he received and

that no one ever told him otherwise. (Rector Depo. at 98:5-99:17);

- Stella's testimony that his scouting, contact with the men shooting dice, forced entry, amount of time waiting before entering, search for people, and reporting were in accordance with the training he received and that no one ever told him otherwise. (Stella Depo. at 94:20-97:2);

- Nichiporuk's testimony that his scouting, forced entry, amount of time waited before forcing entry, manner of pointing firearms, and search were in accordance with the training he received and no one every [sic] told him otherwise. (Nichiporuk Depo. at 85:10-87:21).

[ER 1746] Plaintiffs also submit evidence that Messerschmidt's superiors, Lawrence, Ornales and Deputy D.A. Wilson reviewed the warrant affidavit before it was submitted and that Lieutenants Maxwell and Evans reviewed audiotapes and reports regarding the entry. (Messerschmidt Depo. at 30:25-32:22; Deposition of Patrick Edward Maxwell, August 8, 2006 ("Maxwell Depo."), attached as Exh. CC to the Mann Decl., 36:15-37:5, 51:17-53:11, 55:10-25, 81:13-21, 138:12-129:3, & 37:23-39:13).

Plaintiffs are correct that this testimony is relevant to their *Monell* claims. However, this Court cannot determine, based on this evidence alone, that Individual Defendants acted pursuant to County policy, custom or practice. Rather, the evidence shows

that these particular Individual Defendants *believe* they acted in accordance with such policy. Therefore, the Court denies Plaintiffs' Motion for Summary Adjudication on this issue.

### 2. Whether Plaintiffs Have Presented Sufficient Evidence of a Constitutionally Infirm Policy to Withstand Summary Judgment on Their *Monell* Claims

Municipal Defendants contend that they are entitled to summary judgment on Plaintiffs' *Monell* claims because Plaintiffs fail to present any evidence of a custom, policy or practice that caused a violation of federal constitutional rights. Defendants argue that Plaintiffs have, likewise, failed to establish that Individual Defendants committed some wrong, and that the Municipal Defendants' policy was the "moving force" behind that conduct.

A policy is a "deliberate choice to follow a course of action . . . made from among various alternatives by the official or officials responsible for establishing final policy with respect to [ER 1747] the subject matter in question." *Fairley v. Luman,* 281 F.3d 913, 918 (9th Cir. 2002) (per curiam) (internal citations omitted). Therefore, liability may attach when an employee acts pursuant to an "expressly adopted official policy," *Lytle v. Carl,* 382 F.3d 978, 982 (9th Cir. 2004), or where an employee committed a constitutional violation pursuant to a "long standing practice

or custom." *Webb v. Sloan*, 330 F.3d 1158, 1164 (9th Cir. 2003), *cert. denied*, 540 U.S. 1141 (2004). Regardless, the policy or practice must be so "persistent and widespread" that it constitutes a "permanent and well settled city policy." *Fairley*, 281 F.3d at 918. The custom, policy or practice need not, in and of itself, be unconstitutional in order to permit *Monell* liability. *City of Canton v. Harris*, 489 U.S. 378, 386 (1989). Additionally, such policy may be one of action or inaction. *Long v. County of Los Angeles*, 442 F.3d 1178, 1185 (9th Cir. 2006).

Plaintiffs contend that they may establish Municipal liability by showing any one of the following three things: (1) a custom, practice or policy, which caused a constitutional violation; (2) that "the County was deliberately indifferent to a need to properly train its employees," *Canton*, 489 U.S. at 387; *Fairley*, 281 F.3d at 917; or (3) that the County "ratified the unconstitutional conduct." *Larez*, 946 F.2d at 630. While this Court agrees with Plaintiffs' general premise that a municipality may, in certain circumstances, be liable on *Monell* claims where it ratified unconstitutional conduct or failed to act, the requirement of a "custom, practice or policy" is present under all such theories.

For instance, "[t]o impose liability against a county for its failure to act, a plaintiff must show: (1) that a county employee [ER 1748] violated the plaintiff's constitutional rights; (2) that the county has *customs or policies* that amount to deliberate indifference, and (3) that these customs or policies were

the moving force behind the employee's violation of constitutional rights." *Long*, 442 F.3d at 1186 (emphasis added). Likewise, under the "ratification" theory, municipal liability attaches only where "a deliberate choice is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question." *See Gillette v. Delmore*, 979 F.2d 1342, 1347 (9th Cir. 1992); *see also Larez*, 946 F.2d at 645 (in which the court held that Chief Gates could be officially liable based on his ratification of a decision that deprived plaintiffs of their constitutional rights if the ratification was "attributable to an official policy or custom.")

Therefore, that Plaintiffs are proceeding in their *Monell* claims under these particular theories does not eliminate the fact that they must submit evidence of an official policy or custom. Plaintiffs have not done so here. They have not clearly and expressly articulated the policy they are challenging. While Plaintiffs do submit evidence in the form of testimony that tends to support their arguments of failure to act and that Individual Defendants acted according to custom and policy in committing the alleged constitutional violations in this case, evidence of a single alleged constitutional violation cannot establish a custom, policy or practice under *Monell*.

In an attempt to demonstrate a custom, practice or policy, Plaintiffs submit evidence of what they contend are incidents [ER 1749] similar to what

occurred at the Millender Residence.[13] Specifically, Plaintiffs cite four cases in which they claim announcements were made almost simultaneously with breaking in "several incidents" where reports indicate that officers waited approximately 20 or more seconds and then broke in, and other incidents where the plan was to set a hook on the door before announcing their presence, resulting in unnecessary property destruction. (Declaration of Samantha Koerner and Exhibits in Support of Plaintiffs' Supplemental Brief ("Koerner Decl.") ¶¶ 4-16).

This evidence does not create a genuine issue of fact. The numbers that Plaintiffs present regarding potentially similar incidents are entirely without context. For instance, no evidence is presented regarding the overall number of warrants issued of [sic] the same five-year period at issue. Furthermore, all of the specific circumstances of each incident have not been verified and disclosed. Significantly, Plaintiffs have not provided evidence as to the resolution of these claims. Without such information, mere evidence that

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[13] Because there were outstanding discovery issues at the time Plaintiffs opposed Defendants' Motion for Summary Judgment, the Court requested that the Parties submit supplemental briefing on the status of such issues, and how they impacted the Parties' ability to move for and oppose summary judgment. In their supplemental briefing, Plaintiffs note that, since the time they filed their Opposition, they have received additional discovery in the form of Search Warrant Service Packages. Thus, in their supplemental brief, Plaintiffs submit additional argument based on the newly discovered evidence.

claims were made is meaningless and unpersuasive. Nevertheless, because there is outstanding discovery, which Plaintiffs contend will support their *Monell* claims, this court defers its ruling on these claims until discovery is complete. [ER 1750] Defendants are hereby ordered to provide forthwith whatever outstanding, responsive evidence they can locate with due diligence.

### 3. Whether Sheriff Baca is a Proper Defendant

Defendants argue that Sheriff Baca is not a proper Defendant, because Plaintiffs' claim against him in his official capacity is redundant of their claim against the County. In support of their argument, Municipal Defendants rely on *Robinette v. Barnes,* in which the court dismissed an official because there was no procedural or remedial advantage to the plaintiff. 854 F.2d 909, 911 n.1 (6th Cir. 1988). This Court agrees with Defendants that Plaintiffs' claims against Sheriff Baca are superfluous. Therefore, Municipal Defendants' Motion for Summary Judgment on Plaintiffs' claim against Defendant Baca is granted.

## H. Count Three – Violation of the 14th Amendment/42 U.S.C. § 1985(3)

Municipal Defendants move for summary judgment on Count Three, brought against all Defendants. They argue that it creates confusion, because

although they appear to be asserting a "conspiracy" claim under 42 U.S.C. § 1985(3), Plaintiffs assert in the body of the count that "each police officer defendant is liable to Plaintiffs under 42 U.S.C. 1981, 1982, and 1985." (Complaint ¶ 26). Still later in the same paragraph, Plaintiffs further allege that all Defendants are liable "pursuant to 42 U.S.C. 1986." (*Id.*) Defendants contend that, regardless of what Plaintiffs are actually attempting to allege, they cannot maintain their claims under any of the cited code sections.

[ER 1751] **1. Plaintiffs' Claim for Conspiracy Under 42 U.S.C. § 1985(3)**

To state a claim for violation of 42 U.S.C. § 1985(3), a plaintiff must allege and prove the following four elements:

> (1) a conspiracy; (2) for the purpose of depriving, either directly or indirectly any person or class of persons of the equal protection of the laws, or of the equal privileges and immunities under the laws; and (3) act in furtherance of the conspiracy; (4) whereby a person is either injured in his person or property or deprived of any right or privilege of a citizen of the United States.

*United Bhd. of Carpenters & Joiners, Local 610 v. Scott,* 463 U.S. 825, 828-29 (1983). Furthermore, a claim under § 1985(3) can only be maintained if there is "some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the

conspirators' action." *Id.* at 834 (quoting *Griffin v. Breckenridge,* 403 U.S. 88, 102-103 (1971)).

To prove a "conspiracy" under § 1985, "the plaintiff must show an agreement or meeting of the minds by the defendants to violate his constitutional rights." *Caldeira v. County of Kauai,* 866 F.2d 1175, 1181 (9th Cir. 1989), *cert. denied,* 493 U.S. 817 (1989). "[E]ach participant must at least share the common objective of the conspiracy." *United Steel Workers of Am. V. Phelps Dodge,* 865 F.2d 1539, 1541 (9th Cir. 1989). "A mere allegation of conspiracy [ER 1752] without factual specificity is insufficient." *Karim-Panahi v. Los Angeles Police Dept.,* 839 F.2d 621, 625 (9th Cir. 1988).

Defendants argue that Plaintiffs set forth no specific facts or evidence that Defendants' alleged actions were racially motivated or class-based. Defendants, on the other hand, point to the testimony of Walker and Messerschmidt that the preparation and execution of the search warrant had nothing to do with the Millenders' race. (Messerschmidt Decl. ¶ 39; Walker Decl. ¶ 22). Similarly, Plaintiffs have provided no evidence of a "conspiracy," a "meeting of the minds," or any act "in furtherance of the conspiracy."

In Opposition to Defendants' Motion, Plaintiffs contend that: (1) Defendants' failure to provide timely discovery responses has impacted Plaintiffs' ability to oppose the Motion; (2) Regardless of discovery issues, Plaintiffs have a list of personnel complaints provided by Defendants, which includes 15 complaints, many of which directly mention racial discrimination; and

(3) this was not your typical police misconduct case in which police come upon a suspect without any previous contact. (Plaintiff's Opp. to MD's MSJ at 6:19-8:4).

Because of the discovery issues complained of, Plaintiffs have submitted supplemental briefing since the filing of their Opposition. In that Supplemental Briefing, Plaintiffs acknowledge that Defendants have provided 73, out of a supposed 90, claims dating between 11/16/98 and 10/9/03 and alleging wrongful search and/or entry. (Plaintiffs' Supp. Brief at 10:4-16). Plaintiffs note that, among these, "2 specifically allege race discrimination; 2 allege retaliation for not allowing sheriffs into the house [ER 1753] because they don't have a warrant; and 1 alleges retaliation for having previously filed a lawsuit against the Sheriff's Department." (Koerner Decl. ¶ 19). As to the 15 personnel complaints Plaintiff already had, claims include "traffic citation," "traffic citation/ discrimination," "traffic stop," improper search," "racial profiling," "improper detention," "use of force," etc. Plaintiffs contend that there are "clearly" complaints of overt racial discrimination and that others, if probed further, would most likely include racial discrimination a [sic] well. By the Court's count, one of the claims includes a specific reference to race in the actual "title" of the Complaint (racial profiling), and one more specifically mentions discrimination (traffic citation/discrimination). This list appears to include complaints against the 27 originally named Individual Defendants for a period of at least 1999 through November 2003. (Cook Decl. Exh. LL).

Plaintiffs appear to be arguing that they are part of a protected class in that they are African-American. (Complaint ¶ 26). They may even be arguing that they are protected in the sense that they are being retaliated against because a family member filed and won a lawsuit against the LASD and/or they would not let the officers search their home without a warrant. This is unclear, because Plaintiffs do not specifically state any information about the "protected class" in their Opposition. Rather, the Court has made these assumption [sic] based on Plaintiffs' discussion of the claims and lawsuits against Defendants. Plaintiffs make no link, however, between these claims and any actions taken against Plaintiffs. This Court agrees with Defendants that Plaintiffs have made no [ER 1754] specific allegations as to how Defendants conspired together and have submitted no evidence that any actions they took were based on race or other "membership" in a protected class.

In their Opposition, Plaintiffs' appear to be arguing that the "conspiracy" is based on the following facts: (1) Messershcmidt worked up his case for a couple of weeks; (2) several people looked at his affidavit; (3) Messerschmidt asked around and was informed that the Millender Residence was a "problem" house; (4) the entry team met a [sic] the Millender residence the day before the search and spoke with Mrs. Millender and Brenda; (5) according to Mrs. Millender (but disputed by Defendants), deputies asked if they could come in to her house, she said only with a warrant, and they laughed; and (6) after

meeting with the Millenders, Defendants spent the day planning how they would serve the warrant knowing they would have the opportunity to teach Mrs. Millender a lesson for her failure to cooperate. Plaintiffs do not cite evidence in support of any of these statements.

Plaintiffs cannot rely merely on the fact that they are African American and that Defendants planned for and executed a search of their residence. Thus, Plaintiffs have provided no evidence whatsoever of any racial or other class-based motivations, a conspiracy, or any acts in furtherance of a conspiracy. Considering the evidence presented in the light most favorable to Plaintiffs, this Court finds that Plaintiffs have not presented evidence sufficient to create a genuine issue of material fact and grants Defendants' Motion for Summary Judgment on Plaintiffs claim under 42 U.S.C. § 1985(3).

[ER 1755] **2. Plaintiffs' Claim Under 42 U.S.C. § 1981**

Count Three also states that "each police officer defendant is liable to Plaintiffs under 42 U.S.C. 1981. . . ." (Complaint ¶ 26). Section 1981 provides in relevant part:

> All persons within the jurisdiction of the United States shall have the same right in every State and territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of

> all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. § 1981 (West 2003). "An important purpose of section 1981 is to eliminate race based interference with the right of each citizen to contract." *Imagineering, Inc. v. Kiewit Pacific Co.*, 976 F.2d 1303, 1318 (9th Cir. 1992). Plaintiffs make no allegations in this regard. Furthermore, Plaintiffs do not specifically oppose Defendants Motion in this regard. Accordingly, this Court grants Defendants' Motion for Summary Judgment on Plaintiffs' claim under 42 U.S.C. § 1981.

### 3. Plaintiffs' Claim Under 42 U.S.C. § 1982

Count Three also states that "each police officer defendants [sic] is liable to Plaintiffs under 42 U.S.C. . . . 1982. . . ." (Complaint ¶ 26). Section 1982 provides that: "All citizens of the united States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, [ER 1756] purchase, lease, sell, hold, and convey real and personal property." 42 U.S.C. § 1982 (West 2003).

"Racial discrimination must be shown to state a colorable Section 1982 claim." *W. Coast Theater Corp. v. City of Portland*, 897 F.2d 1519, 1527 (9th Cir. 1990). Conclusory allegations and/or unwarranted inferences are insufficient. *Sprewell v. Golden State*

*Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). Defendants move this Court for Summary Judgment on this claim, because Plaintiffs make no allegations whatsoever regarding their right to "inherit, purchase, lease, sell, hold, and convey real and personal property." Furthermore, Plaintiffs do not specifically oppose Defendants Motion in this regard. Accordingly, this Court grants Defendants' Motion for Summary Judgment on Plaintiffs' claim under 42 U.S.C. § 1982.

### 4. Plaintiffs' Claim Under 42 U.S.C. § 1986

Finally, Plaintiffs' Count Three states that "any governmental any [sic] supervisorial police defendant who had the power to but who did not prevent the violations of § 1985 are liable to each plaintiff pursuant to 42 U.S.C. 1986." (Complaint ¶ 26). Section 1986 provides that:

> Every person who, having knowledge that any of the wrongs conspired to be done are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured. . . .

[ER 1757] 42 U.S.C. § 1986 (West 2003). A conspiracy under 42 U.S.C. § 1985 is a prerequisite to a valid claim under Section 1986. *See Karim-Panahi*, 839 F.2d at 625.

Defendants move for summary judgment on the ground that Plaintiffs cannot establish a claim for

conspiracy under Section 1985. This Court has considered Plaintiffs' arguments and evidence in support of their Section 1985 claim and found them unconvincing. Because this Court has granted Defendants' Motion for Summary Judgment on the Section 1985(3) conspiracy claim, Plaintiffs cannot maintain their Section 1986 claim. Accordingly, Defendants' Motion for Summary Judgment on such claim is granted.

## I. Count Four – Violation of California Constitution, Article I, §§ 1, 7 and 13

Plaintiffs bring a claim for violation of California Constitution Article I, §§ 1, 7 and 13[14] against the

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[14] Article I, § 1 of the California Constitution reads:

"All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness and privacy.

Article I, § 7 of the California Constitution states in pertinent part that:

> (a) A person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws . . .
>
> (b) A citizen or class of citizens may not be granted privileges or immunities not granted on the same terms to all citizens. . . .

Article I, § 13 provides that: "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable seizures and searches may not be violated; and a warrant may not issue except on probable cause, supported by oath or affirmation, articularly [sic] describing the place to be searched and the persons and things to be seized.

County of Los [ER 1758] Angeles only. Municipal Defendants move for summary judgment on this claim on two grounds.

First, Municipal Defendants argue that, to the extent Plaintiffs seek to maintain their claims for damages directly under the California Constitution rather than an enabling statute, such as Civil Code section 52.1, such claims must fail, because an action for monetary damages is not available. Plaintiffs respond that all provisions of the California Constitution are self-executing and, therefore, support claims for declaratory relief or injunction. *Katzberg v. Regents of the University of California*, 29 Cal. 4th 300, 306 (2002). Thus, *Katzberg* establishes a framework for determining the relevant question – whether money damages are available under the specific constitutional provision at issue for the specific wrong alleged. Under such framework, a court considering this question must first "look at the language and history of the provision for an affirmative intent to authorize a claim for damages." *Reinhardt v. Santa Clara County*, 2006 WL 662741, *8 (N.D. Cal.) (applying *Katzberg*, 29 cal. 4th at 317). Where there is no such affirmative intent, the court must consider whether an adequate remedy exists, the extent to which a constitutional tort action would change established tort law, and the nature and significance of the constitutional provision." *Id.* Finally, "if these factors weigh against the recognition of a right to damages, the inquiry ends. If, however, the factors weigh in favor of recognizing such a right, the court

should also consider any special factors counseling hesitation in recognizing a damages action." *Id.*

[ER 1759] As to Article I, § 7, the *Katzberg* court found that this section did not manifest an intent to create an independent damages remedy, and that alternative remedies were available under Cal. Civ. Code § 52.1 and 42 U.S.C. § 1983. 29 Cal. 4th at 318-24. Likewise, this Court finds that such alternative remedies are available and that Plaintiffs have, in fact, brought claims under § 1983 and California Civil Code § 52.1. Therefore, Municipal Defendants are entitled to summary judgment on Plaintiffs' claim under California Constitution Article I, § 7.

Plaintiffs' Count Four, however, also alleges violations of California Constitution Article I, §§ 1 & 13. The California Supreme Court has held that a plaintiff can bring a private action for injunctions under Article I, Section 1 for alleged violations of privacy. *Hill v. Nat'l Collegiate Athletic Assoc.*, 7 Cal. 4th 1, 8, 20 (1994). However, no California state court has ruled on this issue and neither has the Ninth Circuit. This Court notes, however, that Judge Phillips of the Central District of California has addressed this question, and the question as it relates to Article I, § 13. *Smith v. County of Riverside,* No. EDCV 05-00512 VAP, at *16-18 (C.D. Cal. May 16 2006). While the *Smith* opinion is not binding on this Court, Judge Phillips reasoning is persuasive and applies to the facts of this case.

As to Article I, § 1, Plaintiffs have provided no reason as to why this Court should allow an action for monetary damages.[15] Furthermore, as with Plaintiffs Article I, § 7 claim, alternative [ER 1760] remedies are available to Plaintiffs under Cal. Civil Code § 52.1 and 42 U.S.C. § 1983. Allowing Plaintiffs to sue for money damages for an alleged state constitutional privacy violation would create a new cause of action, altering established tort law in California. Therefore, the Court grants Defendants' Motion for Summary Judgment in regard to Plaintiffs' claims for violation of the California Constitution, Article I, § 1.

Finally, the Court must consider Plaintiffs' claims under Article I, § 13. As Plaintiffs point out, the *Katzberg* court specifically differentiated the rights flowing to a victim of an illegal search and seizure from the remedies available under a due process liberty rights violation. 29 Cal. 4th at 321-24. Relying on an opinion from the New York Court of Appeals, the California Supreme Court in *Katzberg* stated that there was "historical support for an implied remedy in damages" in the English common law. *Id.* at 322 (quoting *Brown v. New York*, 674 N.E. 2d 1129, 1139 (1996)). Thus, the *Katzberg* court noted that its holding that no damages remedy was available under Article I, § 7 was based in part on the lack of evidence as to any "similar history with respect to the liberty

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[15] Plaintiffs contend that, in *Porten v. Univ. of San Francisco*, the court held that Article I, Section 1, supported an action for money damages. However, this Court does not agree.

interest," indicating that he would have found a damages remedy under Article I, § 13. 29 Cal. 4th at 323. In the absence of an actual California Supreme Court decision, this Court Must apply the law as we believe the California Supreme Court would apply it." *Astaire v. Best Film & Video Corp.*, 116 F.3d 1297, 1300 (9th Cir. 1997).

Therefore, this Court finds that Plaintiffs are entitled to assert a claim for monetary damages under Article I, § 13 of the California Constitution. Accordingly, Defendants' Motion for [ER 1761] Summary Judgment on Plaintiffs' Count Four is denied as it relates to Article I, § 13.

Because Plaintiffs' claim for violation of California Constitution, Article I, § 13, remains, this Court must address Defendants' second argument. Municipal Defendants argue that Plaintiffs' claim under the California Constitution is based on the very same allegations as are Counts One and Two under the Federal Constitution and Section 1983. Specifically, the common allegations are that Defendants allegedly "interfere[d] with Plaintiffs' rights to be free from unreasonable invasions of their privacy and unreasonable search and seizure and to be accorded due process." (Complaint ¶¶ 24, 25 & 27). Thus, Municipal Defendants argue that, because the claims are the same, the analysis is the same and "[j]ust as defendants did not violate plaintiffs' federal constitutional rights, so too was there no violation of state constitutional rights."

Plaintiffs generally agree with Defendants, but make the opposite argument – that because Plaintiffs have stated constitutional violations under the Fourth and Fourteenth Amendments, so to [sic] have they stated claims under the California Constitution. Additionally, Plaintiffs assert that the protections of the California Constitution are broader than the United States Constitution. *People v. Brisendine,* 13 Cal. 3d 528 (1975). However, they make no argument as to how, if true, this should impact the Court's analysis. Therefore, this Court interprets this as an agreement by the Parties' that the Court's findings on the probable cause and unreasonable search and seizure claims in regard [ER 1762] to the federal constitutional claims should apply equally to the state claims.

### J. Count Five – Violation of Civil Code Section 52.1(b)

In Count Five of their Complaint, Plaintiffs assert a claim for violation of Civil Code Section 52.1(b) against the County of Los Angeles only. Section 52.1(b) provides in pertinent part:

> Any individual whose exercise or enjoyment of rights secured by the Constitution or laws of the United states, or of rights secured by the Constitution or laws of this state, has been interfered with, as described in subdivision(a), may institute and prosecute

> in his or her own name and on his or her own behalf a civil action for damages. . . .

Cal. Civil Code § 52.1(b) (West Supp. 2007). Thus, when read in conjunction with Section 52.1(a), Plaintiffs constitutional rights must have been interfered with "by threats, intimidation, or coercion." *See* Cal. Civil Code § 52.1(a). (West Supp. 2007).

Defendants move for summary judgment on this claim. In support of their Motion, Defendants argue that *none* of Plaintiffs' constitutional rights were interfered with by the County of Los Angeles. Similarly, Plaintiffs move for summary adjudication on the issue of whether Defendants are liable under *respondeat superior*.

Plaintiffs argue that Individual Defendants violated their constitutional rights. Thus, Plaintiffs claim that the County is liable for such violations under the doctrine of *respondeat superior*. Plaintiffs are correct that, under California law, the [ER 1763] county may be liable for the Individual Defendants' interference with Plaintiffs' constitutional rights by threats, intimidation, or coercion under the doctrine of *respondeat superior*. *See Venegas v. County of Los Angeles*, 32 Cal. 4th 820, 843 (2004). Furthermore, this Court has found that genuine issues of material fact exist as to whether various Individual Defendants committed certain constitutional violations. Accordingly, Municipal Defendants' Motion for Summary Judgment on Plaintiffs' claim for violation of Section 52.1(b) is denied. However, while this Court concludes

that the doctrine of *respondeat superior* is applicable *if constitutional violations are proven*, this Court cannot at this time determine that, as a matter of law, Defendants are liable under the doctrine and entitled to relief under California Civil Code § 52.1. Therefore, Plaintiffs' Motion for Summary Adjudication is also denied.

### K. Count Six – Violation of Civil Code Section 51.7

In Count Six of their Complaint, Plaintiffs assert a claim for violation of California Civil Code Section 51.7 against the County of Los Angeles only. Section 51.7 provides in relevant part:

> (a) All persons within the jurisdiction of this state have the right to be free from any violence, or intimidation by threat of violence, committed against their persons or property because of political affiliation, or on account of any characteristic listed or defined in subdivision (b) or (e) of Section 51, or position in a labor dispute, or because another person perceives them to [ER 1764] have one or more of those characteristics. The identification in this subdivision of particular bases of discrimination is illustrative rather than restrictive.

Cal. Civil Code § 51.7 (West Supp. 2007). Subdivisions (b) and (e) of Section 51 list the characteristics as "sex, race, color, religion, ancestry, national origin, disability, medical condition, marital status, or sexual

orientation. Cal. Civil Code §§ 51(b) & (e) (West Supp. 2007).

Municipal Defendants move for summary judgment on this claim on the grounds that Plaintiffs' allegation of "invidious racial animus," (Complaint ¶ 29), are entirely unsupported. Specifically, Defendants claim that Plaintiffs present no evidence that they were subject to any violence, or threat of violence, because of their race. Plaintiffs respond with the argument that they were unable to prepare adequately enough to oppose a motion on this issue due to Defendants' failure to provide discovery.

As this Court previously discussed in regards to Plaintiffs' claim for conspiracy under 42 U.S.C. § 1985(3), Plaintiffs' argument must fail. At the Court's request, Plaintiffs submitted supplemental briefing on the status of outstanding discovery and its impact on their ability to move for or oppose summary judgment.

In such briefing, Plaintiffs set forth further evidence that Defendants had provided through discovery. That evidence and its application to Plaintiff's "racial animus" claims is discussed in greater detail in regard to Plaintiffs' 42 U.S.C. § 1985(3) claim. Such evidence, however, does not create a triable issue of fact on this issue. Furthermore, Plaintiffs only remaining issue with [ER 1765] discovery is that Defendants have not provided *all of the responsive* documents, claims, etc. Thus, if and when Defendants further comply, Plaintiffs will simply receive

more personnel complaints, claims, etc. in regard to the department as a whole. Such claims are not final judgments and can not establish that Individual Defendants acted in a racially discriminatory manner. Plaintiffs do not argue that they are awaiting discovery on anything else, which would bear on these claims. Furthermore, as the Court discussed earlier, Plaintiffs have provided no specific allegations or evidence regarding racial animus on the part of these particular Individual Defendants. Accordingly, Defendants' Motion for Summary Judgment on Plaintiff's claim for violation of California Civil Code § 51.7 is granted.

### L. Count Seven – Negligence (Civil Code § 1714)

In Count Seven of their Complaint, Plaintiffs assert a claim for negligence against the County of Los Angeles only. (Complaint ¶¶ 30 & 31). Defendants move for summary judgment on the negligence claim on the grounds that the County is immune pursuant to California Government Code § 815. Section 815 provides that "[e]xcept as otherwise provided by statute, a public entity is not liable for an injury, whether such injury arises out of an act or omission of the public entity or a public employee or any other person." California Government Code § 815 (West 1995). In response, Plaintiffs argue that the County is, in fact, liable under the doctrine of *respondeat superior*.

At the outset, the Court notes the confusion among the Parties as to what is actually alleged. Defendants correctly argue that the County cannot be held directly liable for its own acts or [ER 1766] omissions, because it is immune under Section 815. However, in their Opposition, Plaintiffs concede that they are not claiming that the County is directly liable for negligence. Rather, Plaintiffs contend, pursuant to California Government Code § 815.2, that the County is liable for the negligence of its employees based on the theory of *respondeat superior*. Section 815.2 provides that:

> a public entity is liable for injury proximately caused by an act or omission of an employee of the public entity within the scope of his employment if the act or omission would, apart from this section, have given rise to a cause of action against that employee or his personal representative."

California Government Code § 815.2 (West 1995). Thus, Plaintiffs claim that the County is liable for the negligent acts or omissions of its employees, such as detaining and threatening to use force against Plaintiffs and for their negligent hiring, training, supervision and discipline of other employees of the County.

Accordingly, Municipal Defendants' Motion for Summary Judgment as to Count Seven is denied, on the grounds that they have not properly challenged Plaintiffs' claims under Government Code § 815.2. However, this Court notes that, should Plaintiffs have any intention of asserting a claim of direct negligence

against the County, they are precluded from doing so as a matter of law pursuant to Government Code § 815.

### M. Eleventh Amendment Immunity

The Municipal Defendants' final argument is that they are absolutely immune from tort liability under the Federal Civil [ER 1767] Rights Act. Specifically, Municipal Defendants argue that, based on the California Supreme Court's holding in *Venegas v. County of Los Angeles,* the Sheriff's Department and Sheriff Baca were acting on behalf of the State of California while conducting criminal investigations and performing law enforcement activities. 32 Cal. 4th 820 (2004). The *Venegas* court held that "sheriffs act on behalf of the state when performing law enforcement activities," such that, "when acting in their law enforcement roles, California sheriffs are . . . absolutely immune from prosecution for asserted violations of [42 U.S.C. § 1983]." *Id.* at 826.

This Court agrees with Plaintiffs, however, that "[q]uestions regarding section 1983 liability implicate federal, not state law." *Brewster v. Shasta County,* 275 F.3d 803, 811 (9th Cir. 2001). The Ninth Circuit has specifically held that, "[a]lthough we must consider the state's legal characterization of the government entities which are parties to these actions, federal law provides the rule of decision in section 1983 actions." *Streit v. County of Los Angeles,* 236 F.3d 552, 560 (9th Cir. 2001). Based on *Streit,* LASD and Sheriff Baca

are not arms of the state and are not entitled to Eleventh Amendment immunity. Accordingly, Municipal Defendants' Motion for Summary Judgment in this regard is denied. However, to the extent that this Court has already granted Municipal Defendants' Summary Judgment on Plaintiffs *Monell* claims, this issue is moot.

[ER 1768] **V. Conclusion**

For all the foregoing reasons, this Court (1) Grants in part and denies in part Plaintiffs' Notice of Motion and Motion for Summary Adjudication; (2) Grants in part and denies in part Individual Defendants' Notice of Motion and Motion for Summary Judgment and/or Summary Adjudication of Issues; and (3) Grants in part and denies in part Municipal Defendants' Notice of Motion and Motion for Summary Judgment or, in the Alternative, for Summary Adjudication. The Court defers its ruling on Municipal Defendants' Motion as it relates to Plaintiffs' *Monell* claims until discovery is complete. Defendants are hereby ordered to provide forthwith all outstanding, responsive discovery they can locate with due diligence.

The Court sets a status conference for 11:00 a.m. on Monday, March 26, 2007 to discuss the status of discovery and possible bifurcation of Plaintiffs' *Monell* claims.

IT IS SO ORDERED.

Dated: _____

_____
DEAN D. PREGERSON
United States District Judge

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**UNITED STATES DISTRICT COURT**

**CENTRAL DISTRICT OF CALIFORNIA**

| | |
|---|---|
| AUGUSTA MILLENDER, BRENDA MILLENDER, WILLIAM JOHNSON,<br>Plaintiffs,<br>vs.<br>COUNTY OF LOS ANGELES, et. al.,<br>Defendants. | Case No. CV 05-2298 DDP (RZx)<br>**PLAINTIFFS' APPLICATION FOR CERTIFICATION OF ORDER FOR INTER-LOCUTORY APPEAL; DECLARATION OF COUNSEL**<br>(Filed Apr. 2, 2007) |

TO THE COURT AND DEFENDANTS AND THEIR ATTORNEYS OF RECORD:

Plaintiffs respectfully request an order certifying for appeal to the Ninth Circuit its Order granting defendants partial summary judgment, entered March 19, 2007. The Court is requested to certify the

following issues arising from its ruling on said motion:

1) whether the warrant contained probable cause to believe Jerry Bowen would be at the Millenders' home; and

2) whether the warrant contained probable cause to search for documents tending to indicate who had control of the Millenders' home.

Plaintiffs' application for certification is made pursuant to 28 U.S.C. §1292(b) and is based upon the attached Memorandum of Points and Authorities, Declaration of Samantha Koerner, upon the moving, opposing, and reply papers relating to plaintiffs motion for summary adjudication, and the Court's Order entered April 19, 2007, and upon all of the pleadings, papers, and orders on file herein.

Plaintiffs make this application because they were informed March 27, 2007, of defendants' intention to appeal the denial of qualified immunity to defendants Messerschmidt and Lawrence on the issues of the warrant's overbreadth decided in plaintiffs' favor (no probable cause to search for guns other than the one used by Bowen in the shooting and evidence of gang affiliation). This application is not made as a noticed motion because 28 U.S.C. § 1292(b) requires that it be filed within ten days of the entry of the Court's order.

The parties met and conferred concerning this application on March 28, 2007. Plaintiffs asked

defendants if they would stipulate, given their own appeal. On April 2, defendants informed plaintiffs that they oppose the application.

DATED: April 2, 2007

**ROBERT MANN**
**DONALD W. COOK**
Attorneys for Plaintiffs

By /s/ [Illegible]
Robert Mann

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## I. INTRODUCTION

On March 19, 2007, the Court entered its Order on the parties' cross motions for summary adjudication/judgment. In that Order, the Court found in plaintiffs' favor on two issues: there was not probable cause to search for and seize (1) weapons other than the gun used by Bowen and (2) evidence of gang membership, etc. The Court further denied Messerschmidt and his supervisor Lawrence of qualified immunity on those issues. On March 27, 2007, defendants informed plaintiffs of their intention to appeal the denial of qualified immunity.

Also in that Order, the Court granted summary judgment in favor of defendants finding (1) there was probable cause in the warrant to believe Jerry Bowen would be at the Millenders' home, and (2) there was probable cause to search for items tending to establish the identity of the person in control of the premises.

It is these issues plaintiffs seek to adjudicate on appeal while the qualified immunity issue is being decided.

The Court left for a jury to decide the issues having to do with the SWAT team's entry into the home. Plaintiffs do not seek to raise these issues on appeal; but rather to leave them to be decided by a jury at the appropriate time.

## II. THE COURT SHOULD CERTIFY FOR APPEAL TO THE NINTH CIRCUIT THE PROBABLE CAUSE ISSUES DECIDED IN DEFENDANTS' FAVOR

28 U.S.C. §1292(b) provides as follows:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after entry of the order: Provided, however, that application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of

> Appeals or a judge thereof shall so order. (italics in original)

The "controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation" is the probable cause question. If there was not probable cause to believe Bowen was at the Millenders' home, then defendants had no right to be there in the first place, and the case should end, save for damages. Further, if there was not probable cause to search for items tending to indicate who had control of the premises, then defendants would have been in and out of the home in a matter of minutes, rather than four hours, and they would not have had the opportunity to turn the whole house upside down,

As the Court stated in it's order, these are "close questions."

They are also important questions, not only for this case. The Fourth Amendment's touchstone, "reasonableness," *Samson v. California*, 126 S.Ct. 2193, 2201 (2006), may require greater consideration when police break into homes at night in commando-style raids, especially where police know at least some of the residents are innocent people. *Cf. Boyd v. Benton County*, 374 F.3d 773, 780 (9th Cir. 2004) (police tactic – using flashbang – unreasonable "where it was believed that there were up to eight people, most of whom were unconnected to the robbery and may [sic] of whom were likely asleep.")

Similarly, "reasonableness" may require greater limitations on searching for "articles of personal property tending to establish the identity of person [sic] in control of the premise [sic] or premises," because such searches may, in effect, be "general searches," of the type prohibited by the Fourth Amendment. *See Groh v. Ramirez*, 540 U.S. 551, 561, (2004) ("the purpose of the particularity requirement is not limited to the prevention of general searches").

An immediate appeal from the order may materially advance the ultimate termination of the litigation because, if the Court of Appeals finds there was no probable cause, the only issue left for trial would be damages. If the Court of Appeals does not reverse this Court, the parties' and the Court's positions are no different than they are now, because the qualified immunity issue is being appealed anyway, and even if the Court is reversed on that issue, there are still several issues left to be tried.

One of the purposes of allowing the district court to certify issues for an interlocutory appeal is to provide more efficient disposition of litigation. *Ford Motor Credit Co. v. S. E. Barnhart & Sons, Inc.*, 664 F.2d 377 (3d Cir. 1981). An "early" appeal is consistent with the goal of avoiding unnecessary trials, *Akerly v. Red Barn System, Inc.*, 551 F.2d 539 (3d Cir. 1977); *U.S. v. Woodbury*, 263 F.2d 784 (9th Cir. 1959), and avoiding unnecessary or repeated protracted proceedings. *Lipsett v. University of Puerto Rico*, 740 F.Supp. 921 (D.Puerto Rico 1990).

Each of these goals will be met by certification in this case. Certification will significantly reduce the probability of multiple appeals and trials.

Further, at this point, although the parties have engaged in several settlement discussions, because of the outstanding issues, the parties have been unable to settle the lawsuit. Although plaintiffs do not believe that a final determination on the qualified immunity issue will change anyone's settlement posture, the same cannot be said for the probable cause issues. If the Court of Appeals agrees this court was correct, plaintiffs may have to lower their sights. If the Court of Appeals determines this court erred in finding in defendants' favor on the probable cause issues, the defense will have to reconsider their exposure and plaintiffs will have one trial embracing all of the related claims.

At the same time, if the Court of Appeals agrees with this Court and this Court agrees to a stay of the proceedings, there will be only one trial if certification is ordered. Judicial economy and the preservation of judicial resources favor this course. Because all the claims are factually interrelated and interwoven, i.e., given the lack of reliable information concerning Bowen's whereabouts, it was unreasonable for defendants, almost thirty of them, to break into the Millenders' home in a military, commando-style show of force at five o'clock in the morning, plaintiffs are certain to be unreasonably prejudiced by trying the entry issues in isolation.

Although this Court's partial summary judgment rulings did not completely eliminate any party, the matters disposed of were "sufficiently severable legally and factually from the remaining matters" that certification would be proper. *Continental Airlines v. Goodyear Tire & Rubber Co.*, 819 F.2d 1519, 1525 (9th Cir. 1987). Certification is proper in this case because although factually interrelated, the claims sought to be appealed now are sufficiently legally distinct from those which would remain, and the Court of Appeals would not be required to review the same issue twice, even if there were a subsequent appeal. *See Morrison-Knudsen v. Archer*, 655 F.2d 962, 965, (9th Cir. 1981). Allowing plaintiffs to pursue their issues on appeal while defendants pursue the qualified immunity issue would "advance the interests of sound judicial administration and justice to the litigants." *Id.*

Plaintiffs respectfully request the Court certify the two probable cause issues for appeal pursuant to *Federal Rules of Civil Procedure*, Rule 54(b).

DATED: April 2, 2007

**ROBERT MANN**
**DONALD W. COOK**
Attorneys for Plaintiffs

By /s/ [Illegible]
Robert Mann

## DECLARATION OF SAMANTHA KOERNER

I, SAMANTHA KOERNER, declare:

1. I am plaintiff's attorney, and am admitted to practice before this Court. Except where expressly noted, I have personal knowledge of the following facts and, if called as a witness, could competently testify thereto.

2. On March 27, 2007, during a phone conference with defendants and Magistrate Judge Zarefsky, defense counsel Trevor Grimm informed us, for the first time, that his clients intend to appeal the denial of qualified immunity for Messerschmidt and Lawrence on the issue of the warrant's overbreadth.

3. During a phone call the following day, I informed Mr. Grimm of our intention to request that the probable cause issues decided in defendants' favor be certified for appeal, so that these issues could be decided while the qualified immunity issues are being decided. I asked Mr. Grimm if he would stipulate. He stated he would present the issue to the people in his office who are handling the appeal.

4. Today (April 2), I received an e-mail from Mr. Grimm in which he stated that defendants oppose this application.

I declare under penalty of perjury that the foregoing is true of my own knowledge except to those matters alleged on information and belief and as to such matters, I believe them to be true.

Executed this 2nd day of April, 2007, at Los Angeles, California.

/s/ Samantha Koerner
Samantha Koerner

# PETITIONER'S BRIEF

No. 10-704

# In The Supreme Court of the United States

CURT MESSERSCHMIDT and ROBERT J. LAWRENCE,

*Petitioners,*

vs.

AUGUSTA MILLENDER, BRENDA MILLENDER, and WILLIAM JOHNSON,

*Respondents.*

**On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

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## QUESTIONS PRESENTED

This Court has held that police officers who procure or rely on a warrant later determined to be invalid are entitled to qualified immunity, and evidence obtained should not be suppressed, so long as the warrant is not "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." *United States v. Leon*, 468 U.S. 897, 920, 923 (1984); *Malley v. Briggs*, 475 U.S. 335, 341, 344-45 (1986).

1. Under these standards, are officers entitled to qualified immunity where they obtained a facially valid warrant to search for firearms, firearm-related materials, and gang-related items in the residence of a gang member and felon who had threatened to kill his girlfriend and fired a sawed-off shotgun at her, and a detailed affidavit supported the warrant, a district attorney approved the application, no factually on-point case law prohibited the search, and the alleged overbreadth in the warrant did not expand the scope of the search?

2. Should the *Malley/Leon* standards be reconsidered or clarified in light of lower courts' inability to apply them in accordance with their purpose of deterring police misconduct, resulting in imposition of liability on officers for good-faith conduct and improper exclusion of evidence in criminal cases?

## PARTIES TO THE PROCEEDING

The parties to the proceeding in the court whose judgment is sought to be reviewed are:

- Augusta Millender, Brenda Millender, and William Johnson, plaintiffs, appellees below, and respondents here.
- Robert J. Lawrence and Curt Messerschmidt, defendants, appellants below, and petitioners here.

The County of Los Angeles was a defendant in the underlying action and an appellant below, but is not a party to the petition for writ of certiorari.

No corporations are involved in this proceeding.

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## OPINIONS BELOW

The Ninth Circuit's *en banc* opinion is reported at 620 F.3d 1016 (9th Cir. 2010). (Appendix to Petition for Writ of Certiorari ["App."]1-76.) The Ninth Circuit's initial opinion is published at 564 F.3d 1143. (App.79-105.) Its order granting rehearing *en banc*, filed October 2, 2009, is published at 583 F.3d 669. (App.77-78.) The district court's decision denying qualified immunity was not published in the official reports. (Joint Appendix ["JA"]281-384.)

## JURISDICTION

The Ninth Circuit initially filed its opinion on May 6, 2009. (App.79.) Respondents timely petitioned for rehearing, and on October 2, 2009, the Ninth Circuit ordered the case reheard *en banc*. (App.77-78.) The *en banc* panel issued its opinion on August 24, 2010. (App.1-2.) On November 22, 2010, petitioners filed a timely petition for writ of certiorari in this Court. This Court has jurisdiction under 28 U.S.C. §1254(1) to review the Ninth Circuit's August 24, 2010 decision on writ of certiorari.

## CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

Respondents brought the underlying action under 42 U.S.C. §1983, which states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Respondents allege petitioners violated their rights under the United States Constitution's Fourth Amendment, which provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

## STATEMENT OF THE CASE

This case arises from a nighttime search of plaintiffs' residence under warrants to arrest a suspect and search for evidence. The suspect had threatened to kill his girlfriend and fired a sawed-off shotgun at her, and police officers believed they would find him at the residence.

### A. The Attack.

The warrants' affidavit related the following incident:

Jerry Ray Bowen had a violent temper and had repeatedly physically assaulted his girlfriend, Shelly Kelly. Kelly decided to end the relationship and move out of her residence. (JA55.) Fearing Bowen, she asked sheriff's deputies to stand by while she retrieved some of her belongings. When the deputies left to field a call, Bowen attacked her. He attempted to throw her off the second-story landing, bit her and tried to drag her by the hair back into the residence. When Kelly managed to run to her car, Bowen followed, holding "a black sawed off shotgun with a pistol grip." (JA55-56.) Standing in front of the car, he pointed the gun at Kelly and shouted, "If you try to leave, I'll kill you bitch." (JA57.) Although Kelly managed to drive away, Bowen fired a shot at her, blowing out the car's left front tire. He then chased the car firing and missing four more times. (JA57.)

**B. The Investigation.**

After Kelly reported the attack, Curt Messerschmidt, a sheriff's detective, was assigned to investigate the assault. (JA18-21.) He interviewed Kelly and another witness who corroborated her account of the attack. (JA21-22, 24-25, 82-88; 8 Appellants' Excerpts of Record ["ER"] [videotaped interview of Kelly].)[1] Both identified Bowen, a known Mona Park Crip gang member, from a photo lineup. (JA23-29, 39, 64-65, 89-94; 8ER.)

Kelly told Messerschmidt she believed Bowen was staying or "hiding out" at 2234 E. 120th Street, Los Angeles, the home of his foster mother, Augusta Millender. (JA21, 149; 8ER.) Kelly also said Bowen was not living at her residence at 1425 W. 97th Street, where the attack occurred, although he had keys to the residence. (JA18, 21, 25, 83; 8ER.) Kelly said she had been to the Millenders' house with Bowen before the assault. (JA21-22.)

Messerschmidt went to the W. 97th Street location and verified that Bowen was not staying there. (JA22.) From DMV and Cal-Gangs records, he confirmed that Bowen was probably staying at the 120th Street address. (JA25-26, 63, 69.) A sergeant told him the

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[1] In the district court, plaintiffs submitted a purported transcript of Messerschmidt's videotaped interview of Kelly, prepared by their counsel. (3ER 530, 547-71.) Defendants objected to the transcript as lacking foundation. (4ER 1076; *see* JA313 n.6.)

station considered the address a "problem house." (JA26.)[2]

Messerschmidt also checked California law enforcement and criminal history records, the National Criminal Index Center, and the County Warrant System. (JA21, 25-27.) He determined that Bowen was on summary probation for spousal battery and driving without a license, had an extensive criminal background including numerous assault and weapons charges with several felony convictions, and was a "third strike" candidate under California law. (JA21, 26-29; *see* JA70-81.)

### C. The Warrants and Affidavit.

Messerschmidt prepared an affidavit and warrants to arrest Bowen for assault with a deadly weapon and search the 120th Street residence. (JA18, 27-28, 31, 47-62.) The affidavit stated Messerschmidt had 14 years' experience as a peace officer, was a "Gang Investigator" in a special unit for gang-related crimes, and had considerable training and experience as a gang detective, including extensive knowledge concerning "manners in which gang related assaults are committed, the motives for such assaults, and the concealment of weapon(s) used in such assaults." (JA53-54.)

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[2] Sometime before the warrant was executed, Messerschmidt learned that other members of the Millender household were Mona Park Crip gang members. (JA28.)

The affidavit recited Kelly's description of the assault, and stated Messerschmidt had "conducted an extensive background search" on Bowen using "departmental records, state computer records, and other police agency records," confirming Bowen resided at the location. (JA55-58.) The affidavit requested night service of the search warrant because Bowen was affiliated with the Mona Park Crip gang and the nature of the crime – assault with a deadly weapon – showed "night service would provide an added element of safety to the community" and "the deputy personnel serving the warrant, based on the element of surprise." (JA58-59.) The affidavit opined "recovery of the weapon could be invaluable" in successfully prosecuting Bowen and curtailing "further crimes." (JA59.) The affidavit did not mention Bowen's prior criminal record and felony convictions, although it noted Bowen "ha[d] gang ties to the Mona Park Crip gang based on information provided by the victim and the cal-gang data base." (JA59.)

The warrant authorized search and seizure of (1) items tending to establish the identity of persons in control of the premises, (2) all firearms and firearm-related items, and (3) articles of evidence showing, or relevant to, gang membership. (JA52.)

The warrants and affidavit were reviewed by Messerschmidt's superiors, including petitioner Sergeant Robert Lawrence and a lieutenant, and a deputy district attorney, before a magistrate approved them. (JA27-28.)

**D. The Search.**

The Sheriff's Department's SWAT team served the warrants at 5:00 a.m. on November 6, 2003. (JA31.) Messerschmidt and Lawrence were present but did not participate in the search. (JA31-32, 257; 2ER 346-47.) The officers seized Augusta Millender's personal shotgun (a black 12-gauge "Mossberg" with a wooden stock), a box of .45 caliber "American Eagle" ammunition, and a letter from Social Services addressed to Bowen at the 120th Street address. (JA32-33, 95, 97-98.) The officers did not find Bowen or the sawed-off shotgun at the residence. (JA33.)

**E. The Lawsuit.**

Augusta Millender, Brenda Millender, and William Johnson, residents of the 120th Street address, filed suit under 42 U.S.C. §1983 against the County of Los Angeles, the Los Angeles County Sheriff's Department, Sheriff Leroy Baca, and 27 Los Angeles County deputies, including Messerschmidt and Lawrence. (2ER 322-23.) As relevant, plaintiffs alleged violations of their Fourth Amendment rights. (2ER 327.) The parties filed cross motions for summary adjudication on the validity of the arrest and search warrants. (JA99-145; 2ER 477-510.)

The district court concluded the search and arrest warrants were facially valid (JA311), the affidavit established probable cause to believe Bowen would be found at plaintiffs' residence (JA306-11), Messerschmidt did not violate plaintiffs' constitutional rights

by deliberately or recklessly misleading the magistrate regarding whether Bowen was staying at plaintiffs' residence (JA311-19), and the facts in the affidavit justified night service (JA323-27). The court granted defendants' motion for summary adjudication on these issues. (JA311, 319, 327, 383.)[3]

The district court also held the search warrant's authorization to search for all firearms, firearm-related materials, and gang-related items was unconstitutionally overbroad, but its authorization to search for evidence of control of the premises was constitutional. (JA332-34.) Accordingly, the court granted plaintiffs' motion for summary adjudication as to firearm- and gang-related evidence, but granted defendants' motion as to identification evidence. (JA335.) The district court then rejected the deputies' claim of qualified immunity, holding their actions were not objectively reasonable. (JA346.)

## F. The Appeal.

Messerschmidt and Lawrence appealed the denial of qualified immunity. (App.11.) On May 6, 2009, the Ninth Circuit reversed. (App.79-105.) Judges

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[3] The district court denied plaintiffs' application for an order certifying an interlocutory appeal regarding whether the affidavit established probable cause to believe Bowen would be found at plaintiffs' residence, reasoning that it would not materially advance the termination of the litigation and there were no "exceptional circumstances" justifying piecemeal appeals. (JA385-94; Order filed 5/25/07 [docket #114], at 13-14.)

Callahan and Fernandez, in separate opinions, concluded defendants were entitled to qualified immunity. Judge Ikuta dissented. (App.79-105.)

Plaintiffs petitioned for rehearing, and the Ninth Circuit ordered the case reheard *en banc*. (App.77-78.) On August 24, 2010, the *en banc* panel issued a new opinion affirming the denial of qualified immunity. (App.1-39.)

First, the court held the warrant's authorization to search for all firearms and firearm-related materials was overbroad, because although the deputies had probable cause to search for the "'black sawed off shotgun with a pistol grip,'" the affidavit contained no evidence that Bowen possessed other firearms, that "such firearms were contraband or evidence of a crime," or that such firearms were likely present at plaintiffs' residence. (App.15-16, 24.)

Second, the court held the authorization to search for indicia of gang membership lacked probable cause, because the affidavit's statements that Bowen was a gang member did not suggest "'contraband or evidence of a crime' . . . would be found at [plaintiffs'] residence." (App.28-29.)

Finally, the court held the deputies were not entitled to qualified immunity, reasoning the affidavit was "'so lacking in indicia of probable cause as to render official belief in its existence unreasonable'" because the "affidavit indicated exactly what item was evidence of a crime, the black sawed-off shotgun with a pistol grip, and reasonable officers would know

they could not undertake a general, exploratory search for unrelated items" without additional probable cause for those items. (App.3, 31, 35, 38.)

Three judges dissented in two separate opinions. (App.39-76.) First, Judge Callahan, joined by Judge Tallman, found the officers had probable cause to search for firearms and firearm-related materials because Bowen had fired a sawed-off shotgun at a person in public and was a gang member and felon; thus, there was "a 'fair probability'" he had other firearms in his residence and they were "'contraband or evidence of a crime.'" (App.41-42.) Moreover, the officers' and residents' safety justified seizing any firearms encountered in the nighttime search for a dangerous felon. (App.42-43.)

All three dissenting judges found the warrant's authorization to search for gang-related indicia unconstitutionally overbroad, but concluded the officers were entitled to qualified immunity for that provision, as well as any alleged overbreadth in the authorization to search for firearms and firearm-related items. (App.72-73.)

Regarding gang-related items, the dissent[4] noted Messerschmidt knew Bowen had fired a sawed-off shotgun at a person in public and was a gang member and felon; he believed Bowen resided at plaintiffs'

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[4] We refer to Judge Callahan's dissent simply as "the dissent," and to Judge Silverman's dissent by name.

residence. (App.63.) Messerschmidt also had extensive experience with gang-related crimes. (App.64 n.17.) Thus, Messerschmidt could "reasonably have conceived of possible ties between the crime, the weapon and the gang." (App.63-64.)

In concluding the officers were entitled to qualified immunity as to both firearms and gang-related indicia, the dissent noted: (1) there was probable cause for a nighttime search of plaintiffs' residence (App.60-61); (2) the search and arrest warrants were facially valid (App.61); (3) Messerschmidt's superiors and a deputy district attorney approved the warrants (App.62); (4) there was no indication that Messerschmidt acted dishonestly in procuring the warrant (App.62-63, 74); (5) when Messerschmidt sought the warrant, no clear precedent established that it lacked probable cause (App.65-67); and (6) since the officers undisputedly were entitled to search for disassembled parts of the sawed-off shotgun, the warrant's purportedly overbroad provisions did not expand the scope of the search (App.69).

## SUMMARY OF ARGUMENT

Qualified immunity shields public officials from liability for allegedly unconstitutional conduct as long as their conduct was "objectively reasonable" in light of clearly established law. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). This standard strikes a balance between the need to deter official misconduct, and the

need to protect public officials from liability so that they can perform their duties vigorously. *Id.* at 807; *Pearson v. Callahan*, 555 U.S. 223, 231 (2009). Accordingly, it provides "ample room for mistaken judgments" and protects "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341, 343 (1986).

This Court has recognized that where a police officer procures or relies on a warrant later determined invalid, the protections of qualified immunity should be particularly strong. This is because the very fact that an officer has obtained or relied on a warrant bespeaks good faith, and a neutral third party's review of the warrant for probable cause substantially protects Fourth Amendment rights. Moreover, because the policies underlying qualified immunity have largely been served in the typical case where an officer relies on a warrant, the officer's actions should be deemed objectively reasonable, and qualified immunity should be denied, only in the most egregious cases involving flagrant violations of Fourth Amendment rights. *See United States v. Leon*, 468 U.S. 897, 913-14, 921-23 & n.21 (1984); *Malley*, 475 U.S. at 344-45, 346 n.9.

In *United States v. Leon*, the Court enumerated the limited, egregious circumstances where an officer's reliance on a warrant would not be deemed "objectively reasonable": (1) the officer intentionally or recklessly submitted false information to the magistrate; (2) the magistrate "wholly abandoned his judicial role"; (3) the warrant was "so facially deficient – i.e.,

in failing to particularize the place to be searched or the things to be seized – that the executing officers cannot reasonably presume it to be valid"; and (4) the warrant affidavit is "'so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.'" *Leon*, 468 U.S. at 923.

Here, Bowen, a known gang member and felon, threatened to kill his girlfriend, Kelly, and attempted to do so by firing five rounds from a sawed-off shotgun at her in public. Before seeking a warrant to search Bowen's residence, petitioners Messerschmidt and Lawrence prepared an extensive affidavit and had the affidavit and application reviewed and approved by both their supervisors and a deputy district attorney. The judge issued a warrant, authorizing a search and seizure of all firearms and firearms-related materials, and indicia of gang membership.

The Ninth Circuit *en banc* majority, notwithstanding the thoughtful dissents of three colleagues, nonetheless concluded that the warrant materials were so lacking in indicia of probable cause that no reasonable officer should have applied for or relied on the warrant and, in short, the actions of the officers (and their dissenting colleagues) were patently incompetent or bespoke a knowing violation of the law.

The Ninth Circuit flatly erred. As a threshold matter, as the dissent noted, there was probable cause to search for firearms. Officers could logically infer that a gang member and a felon who possessed a sawed-off shotgun and fired it repeatedly at a person

in public would have other firearms and keep them where he lived. Moreover, the officers could reasonably believe such firearms were subject to seizure, given that California law allows issuance of a search warrant for items possessed "with the intent to use them as a means of committing a public offense," Cal. Penal Code §1524(a)(3), and it was conceivable – indeed, likely – that Bowen would use any firearm in his possession to carry out his threat to kill Kelly. Further, under both state and federal law, Bowen, as a felon, could not legally possess firearms. And, in seeking the nighttime arrest of a dangerous felon, the officers had reason to fear for their own and others' safety.

Similarly, as to the search for gang-related items, Messerschmidt was a gang specialist and knew that Bowen had fired a sawed-off shotgun at a person in public and was a felon and gang member. He could reasonably conclude that Bowen's procurement, possession and concealment of the sawed-off shotgun might be related to his gang affiliation. Moreover, since other people lived at the residence, gang paraphernalia might help establish that any guns belonged to Bowen.

Even putting aside the ultimate questions of whether there was probable cause to search for firearms and gang-related items, at the very least, for qualified immunity purposes, the officers could reasonably have thought there might be sufficient probable cause to submit the issue to a magistrate for determination. Numerous circuit courts have construed *Leon* and

*Malley* as creating a presumption that an officer has acted in an objectively reasonable manner in seeking a warrant. This presumption is rebutted only where there is a showing of egregious misconduct by the officer that corrupts the warrant process or essentially renders it meaningless, *i.e.*, where an officer intentionally submitted false or misleading information or omitted relevant facts from the application, the magistrate wholly abandoned his or her judicial role, or the warrant was facially deficient – circumstances the Ninth Circuit did not find to be, and were not, present here.

To the extent the presumption may be rebutted by showing that the warrant was "so lacking in indicia of probable cause" that no reasonable officer could believe a valid warrant could be issued, such a standard at the very least must meet the ordinary requirement for determining that the law is "clearly established" for purposes of qualified immunity. Namely, plaintiff must point to a "robust 'consensus of cases'" that would indicate to an officer that given the particular facts he or she confronted, the issue of probable cause was not even debatable. *Ashcroft v. al-Kidd*, 131 S.Ct. 2074, 2084 (2011). Neither plaintiffs nor the *en banc* majority cited any such cases here.

Yet, it is also worth considering whether the "so lacking in indicia of probable cause" standard should be retained in any form, given that the burden it imposes on the judicial system by inviting endless relitigation of probable cause determinations is not outweighed by any marginal deterrent impact it may

have on officers' attempting to procure warrants when there is no factual basis to do so. As a practical matter, officers have no incentive to submit patently inadequate warrant applications, because they will typically be rejected. Further, the other *Leon* factors amply protect the warrant process from abuse.

Finally, all of the circumstances surrounding procurement of the warrant here manifest the officers' good faith and confirm that they acted reasonably in seeking and relying on the magistrate's finding of probable cause. The warrant itself was facially valid, and a detailed affidavit supported it. The officers had supervisors and an attorney review the warrant materials. Probable cause supported the search, even if the affidavit might have omitted some facts that established probable cause. Moreover, since even the *en banc* majority found probable cause to search for a sawed-off shotgun and its disassembled parts, the warrant's purported overbreadth did not expand the scope of the search beyond areas properly searched even if the warrant were narrowly tailored.

There was no egregious misconduct by petitioners. In good faith, they sought an independent determination of probable cause by a neutral magistrate. Even if that determination is ultimately deemed erroneous, the officers acted with objective good faith both in securing and in relying on the warrant. These are precisely the circumstances in which qualified immunity is appropriate.

## ARGUMENT

### I. POLICE OFFICERS WHO PROCURE OR RELY ON A WARRANT LATER DETERMINED INVALID ARE ENTITLED TO QUALIFIED IMMUNITY ABSENT EGREGIOUS CONDUCT SHOWING THAT THEY ACTED UNREASONABLY IN RELYING ON THE MAGISTRATE'S DETERMINATION OF PROBABLE CAUSE.

#### A. Qualified Immunity Shields Public Officials from Liability for Actions Taken in Objective Good Faith.

The doctrine of qualified immunity shields "government officials performing discretionary functions . . . from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Thus, whether a police officer or other government official may be held personally liable for allegedly unconstitutional conduct depends on the "objective reasonableness of [that] conduct, as measured by reference to clearly established law." *Harlow*, 457 U.S. at 818; *see also Wilson v. Layne*, 526 U.S. 603, 614 (1999) (similar language); *Pearson v. Callahan*, 555 U.S. 223, 243-44 (2009) (same); *Elder v. Holloway*, 510 U.S. 510, 512 (1994) (same). An officer will not be held liable if "a reasonable officer could have believed [his actions] lawful, in light of clearly established law and the information the officer[ ]

possessed." *Wilson*, 526 U.S. at 615; *Anderson v. Creighton*, 483 U.S. 635, 641 (1987).

To be clearly established, "[t]he contours of [a] right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson*, 483 U.S. at 640; *see also Wilson*, 526 U.S. at 614-15 (same). In other words, an officer must have "fair notice that her conduct was unlawful." *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004).

Even if an officer violates a clearly established constitutional right, he may be entitled to qualified immunity if his conduct nonetheless is objectively reasonable – for example, if an officer executing a search warrant "reasonably but mistakenly conclude[s] that his conduct complie[s] with the Fourth Amendment" because he "misunderstand[s] important facts about the search." *Groh v. Ramirez*, 540 U.S. 551, 566-67 (2004) (Kennedy, J., dissenting). Qualified immunity "applies regardless of whether the [officer's] error is 'a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact.'" *Pearson*, 555 U.S. at 231 (quoting *Groh*, 540 U.S. at 567 (Kennedy, J., dissenting)); *see also Butz v. Economou*, 438 U.S. 478, 507 (1978) (public officials "will not be liable for mere mistakes in judgment, whether the mistake is one of fact or one of law").

Qualified immunity balances "the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." *Pearson*, 555 U.S. at

231; *see also Elder*, 510 U.S. at 514-15 (similar reasoning).

Recognizing that public officials will inevitably make mistakes, qualified immunity assumes that "it is better to risk some error and possible injury . . . than not to . . . act at all." *Scheuer v. Rhodes*, 416 U.S. 232, 242 (1974). Accordingly, this Court recently reaffirmed that qualified immunity "gives government officials breathing room to make reasonable but mistaken judgments" and "protects 'all but the plainly incompetent or those who knowingly violate the law.'" *Ashcroft v. al-Kidd*, 131 S.Ct. 2074, 2085 (2011); *Malley v. Briggs*, 475 U.S. 335, 341, 343 (1986).

### B. An Officer's Reliance on a Warrant Normally Establishes That the Officer Acted Reasonably for Qualified Immunity Purposes, Absent Egregious Conduct Manifesting Bad Faith or Gross Incompetence.

In a trio of cases, this Court has clarified application of qualified immunity to an officer's procuring or relying on a warrant later determined to be invalid. Consistent with qualified immunity's focus on protecting individual constitutional rights while also encouraging public officials to perform their duties fully, in each case the Court has emphasized the need to strike a balance between deterring officers from deliberate misconduct and, at the same time, encouraging them to seek judicial intervention before effecting an arrest or search.

These cases, read in the context of this Court's larger jurisprudence concerning qualified immunity and warrants, demonstrate that when an officer procures or relies on a warrant, qualified immunity should be applied with particular rigor. Specifically, the Court has recognized: (1) the fact that an officer has obtained a warrant manifests good faith; (2) the magistrate's review of the warrant for probable cause substantially protects citizens' Fourth Amendment rights; and (3) accordingly, because the policies underlying qualified immunity have largely been served, officers who rely on a warrant later deemed invalid are entitled to qualified immunity absent only the most egregious circumstances negating the presumption of good faith.

### 1. *United States v. Leon*, *Malley v. Briggs*, and *Groh v. Ramirez*.

In *United States v. Leon*, 468 U.S. 897 (1984), the Court recognized a good-faith exception to the Fourth Amendment exclusionary rule, and set forth the standards it would later adopt for determining qualified immunity in the warrant context. The Court addressed whether evidence procured in violation of the Fourth Amendment via an invalid warrant would nevertheless be admissible in a criminal proceeding. The Court held that as long as the officer procured or executed the warrant in "objective good faith," the evidence would be admissible. *Id.* at 920-22.

The Court noted that it had expressed "a strong preference for warrants" because "the detached scrutiny of a neutral magistrate . . . is a more reliable safeguard against improper searches than the hurried judgment of a law enforcement officer engaged in the often competitive enterprise of ferreting out crime." *Id.* at 913-14 (citations and internal quotation marks omitted). Moreover, because "[r]easonable minds frequently may differ on . . . whether a particular affidavit establishes probable cause, . . . the preference for warrants is most appropriately effectuated by according 'great deference' to a magistrate's determination." *Id.* at 914.

The Court further reasoned that the exclusionary rule is "designed to deter police misconduct" and should be applied "only in those unusual cases" where exclusion will further that purpose. *Id.* at 916-18. The Court noted that exclusion could have little deterrent effect – except to deter the police from performing their duties – when officers acted in "complete good faith" or with the "objectively reasonable belief" their conduct was lawful. *Id.* at 918-20. In particular, "'a warrant issued by a magistrate normally suffices to establish' that [an] officer has 'acted in good faith,'" because ordinarily, "an officer cannot be expected to question the magistrate's probable-cause determination or his judgment that the form of the warrant is technically sufficient." *Id.* at 920-22 & n.21. Thus, an officer was entitled to rely on a magistrate's determination, and any evidence procured would be admissible, absent some showing that the officer's reliance

was, in no way, "objectively reasonable." *Id.* at 920-22 & n.23.

The Court explained that under this standard, the evidence would be suppressed in only the most extraordinary circumstances, where the officer's conduct in applying for or relying on the warrant bespoke bad faith. *Id.* at 923-24, 926. For example, an officer's reliance on a warrant would be unreasonable, and the evidence subject to suppression, if the officer intentionally or recklessly submitted false information to the magistrate, or if the magistrate "wholly abandoned his judicial role" and served as part of the prosecution team. *Id.* at 923. Or, a warrant "may be so facially deficient – i.e., in failing to particularize the place to be searched or the things to be seized – that the executing officers cannot reasonably presume it to be valid." *Id.* The Court also concluded that suppression would be justified in situations where it would be preposterous for an officer to believe probable cause might exist – that is, where the warrant affidavit is "'so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.'" *Id.* (citation omitted).

In *Malley v. Briggs*, 475 U.S. 335 (1986), plaintiffs sued a police officer under 42 U.S.C. §1983 for procuring an arrest warrant without probable cause.[5]

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[5] Although *Malley* involved an arrest warrant, the Court noted that the same analysis also applies to search warrants. *Malley*, 475 U.S. at 344 n.6.

Noting that qualified immunity turns on the "objective reasonableness" of an officer's conduct, the Court held that the same standard applied in *Leon* to suppression hearings also applies to determining whether an officer who procures a defective warrant is entitled to qualified immunity. *Id.* at 343-44. Thus, qualified immunity should be denied "[o]nly where the warrant application is so lacking in indicia of probable cause as to render official belief in its existence unreasonable." *Id.* at 344-45.

The Court again emphasized that this was a high standard to meet – that is, an officer could not be held liable simply because he or she was ultimately incorrect as to whether there was probable cause to arrest. The Court noted that it was not requiring "the police officer to assume a role even more skilled . . . than the magistrate." *Id.* at 346 n.9. As the Court explained, since magistrates obviously are "'more qualified than . . . police officer[s]'" to determine probable cause, "where a magistrate acts mistakenly in issuing a warrant but within the range of professional competence of a magistrate, the officer who requested the warrant cannot be held liable." *Id.* The Court underscored that qualified immunity would be denied only in the most egregious cases and would provide "ample protection to all but the plainly incompetent or those who knowingly violate the law." *Id.* at 341.

Significantly, in concurring and dissenting, Justice Powell, joined by Justice Rehnquist, emphasized that in determining qualified immunity, the magistrate's finding of probable cause should be accorded

"substantial evidentiary weight." *Id.* at 346, 350-51, 353. They commented that "judicial evaluation of probable cause by a magistrate is the essential 'checkpoint between the Government and the citizen,'" and expressed concern that a more restrictive standard would "discourage police officers from seeking warrants out of fear of litigation and possible personal liability," causing them to "close [their] eyes to facts that should at least be brought to the [magistrate's] attention." *Id.* at 352-53.

In *Groh v. Ramirez*, 540 U.S. 551 (2004), plaintiffs sued federal agents under *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971), alleging the officers executed a facially invalid warrant against their property. Specifically, although the warrant application and affidavit specified the items to be searched and seized in plaintiffs' residence – a stockpile of firearms – the warrant itself did not list the items. *Id.* at 554-55.

The Court held the warrant was invalid on its face because it did not specify the evidence sought. *Id.* at 557. The Court also denied qualified immunity, noting the law was clearly established as to what was required on the face of the warrant and "even a cursory reading" would have revealed the deficiency. *Id.* at 563-65.

The Court acknowledged that in *Malley* it had suggested that something more than mere negligence by a police officer was required to impose liability on the officer for executing a warrant issued by a

magistrate. *Groh*, 540 U.S. at 565. But the Court noted that in *Leon* it had observed that a warrant failing to particularize the place to be searched or the things to be seized was "'so facially deficient'" that an executing officer could not reasonably presume it valid. *Id.* at 565 (citing *Leon*, 468 U.S. at 923).

In dissent, Justice Kennedy, joined by Chief Justice Rehnquist, concluded that since the warrant affidavit and application both specified the items to be seized, the omission from the warrant was nothing more than a "clerical error" and a reasonable "mistake of fact," given the numerous "serious responsibilities" an officer must fulfill in executing a search warrant for illegal weapons, including "difficult and important tasks" that "demand the officer's full attention in the heat of an ongoing and often dangerous criminal investigation." *Id.* at 567-68. As Justice Thomas, joined by Justice Scalia, similarly noted in dissent from the denial of qualified immunity, "[g]iven the sheer number of warrants prepared and executed by officers each year," including "detailed" and sometimes "comprehensive" supporting documents, "it is inevitable that officers acting reasonably and entirely in good faith will occasionally make such errors." *Id.* at 579.

Justice Kennedy and Chief Justice Rehnquist further observed that unlike the typical case where a defective warrant has "led to an improper search," here plaintiffs claimed simply that they were injured by a technical defect in form of the warrant. *Id.* at 570-71; *see also id.* at 576 (Thomas, J., dissenting;

noting that the officers conducted the search "entirely within the scope" of the magistrate's authorization). The Justices suggested that "'the purpose of encouraging recourse to the warrant procedure' can be served best by rejecting overly technical standards" when reviewing warrants. *Id.* at 571. Similarly, Justices Thomas and Scalia observed that since the warrant application specified the items to be seized, plaintiffs had effectively received the benefit of a neutral magistrate's determination that probable cause existed for the search. *Id.* at 576.

*Leon*, *Malley* and *Groh*, viewed in the context of this Court's larger jurisprudence concerning qualified immunity and warrants, make it clear that special considerations apply when analyzing qualified immunity in the warrant context. In particular, where a police officer relies on a warrant, the policies underlying qualified immunity normally have been served; hence, liability should be reserved only for egregious cases where those policies patently have been defeated.

### 2. A warrant bespeaks the officer's good faith and substantially protects Fourth Amendment rights, thus fulfilling the policies underlying qualified immunity.

Qualified immunity and the exclusionary rule's good-faith exception attempt to balance similar concerns. Both seek to protect individual rights by deterring police misconduct, while at the same time

allowing effective functioning of government – in particular, effective investigation and prosecution of crime. As this Court reaffirmed last term, "[f]or exclusion to be appropriate, the deterrence benefits of suppression must outweigh its heavy costs" in the form of "suppress[ing] the truth" in criminal proceedings. *Davis v. United States*, 131 S.Ct. 2419, 2427 (2011); *see also Herring v. United States*, 555 U.S. 135, 140 (2009).

Similarly, qualified immunity balances "the importance of a damages remedy to protect the rights of citizens" by holding public officials accountable for their unlawful acts, against the need to protect those officials and "the related public interest in encouraging the vigorous exercise of official authority." *Harlow*, 457 U.S. at 807. Both doctrines have struck the balance by determining that if an officer acts in good faith, as measured by objective criteria – in other words, if the officer's actions are "objectively reasonable" – there is effectively no misconduct to deter. *See Leon*, 468 U.S. at 918-21; *Malley*, 475 U.S. at 343-45.

But as the Court recognized in *Leon*, the mere fact that an officer has obtained a warrant – that he has submitted his facts and inferences to a neutral third party for consideration – in itself, is an act of objective good faith. *See Leon*, 468 U.S. at 922 ("a warrant issued by a magistrate normally suffices to establish" that an officer "'acted in good faith'"), 920 n.21; *United States v. Ross*, 456 U.S. 798, 823 n.32 (1982) (same); *see also United States v. Bonner*, 874 F.2d 822, 825 (D.C. Cir. 1989) ("a warrant ensures that officers have had to support, articulate, and swear to

their assumptions"). As Justice White observed, in concurring in *Illinois v. Gates*, 462 U.S. 213, 262 (1983), "[t]he warrant is prima-facie proof that the officers acted reasonably."

Accordingly, circuit courts have understood *Leon* to create a presumption of good faith where an officer relies on a warrant. *See*:

- *United States v. Corral-Corral*, 899 F.2d 927, 938-39 (10th Cir. 1990) (issuing judge's probable cause finding is "not only a relevant factor, but a significant one . . . in the good-faith equation"; *Leon* created a "presumption . . . that when an officer relies upon a warrant, the officer is acting in good faith");
- *United States v. Mitten*, 592 F.3d 767, 771 (7th Cir. 2010) (fact that officer sought a warrant is "prima facie evidence that he was acting in good faith" and gives rise to a "presumption of good faith");
- *United States v. Tuter*, 240 F.3d 1292, 1300 (10th Cir. 2001) ("'police officers should be entitled to rely upon [a magistrate's] probable-cause determination . . . when defending an attack on their good faith'");
- *United States v. Stearn*, 597 F.3d 540, 561 (3d Cir. 2010) ("[o]rdinarily, the 'mere existence of a warrant . . . suffices to prove that an officer conducted a search

> in good faith,' and will obviate the need for 'any deep inquiry into reasonableness'");
>
> - *United States v. Campbell*, 603 F.3d 1218, 1230 (10th Cir. 2010) ("we generally presume officers executed a search warrant in objective good faith").

Moreover, the fact that a neutral third party has reviewed the warrant for probable cause substantially protects the individual's Fourth Amendment rights. *See Leon*, 468 U.S. at 913-14; *Malley*, 475 U.S. at 352-53 (Powell, J., concurring & dissenting); *Shadwick v. City of Tampa*, 407 U.S. 345, 350 (1972) (warrant represents "an independent assurance that a search and arrest will not proceed without probable cause"); *Ross*, 456 U.S. at 829 (White, J., dissenting; "the warrant requirement provides a number of protections that a *post hoc* judicial evaluation of a [police officer's] probable cause does not"); *al-Kidd*, 131 S.Ct. at 2082 (warrant grants significant "protection against the malevolent and the incompetent"); *see also United States v. Carpenter*, 341 F.3d 666, 669 (8th Cir. 2003) (*Leon* demonstrated that with few exceptions, "a neutral magistrate's intervention . . . provides adequate protection of Fourth Amendment rights"). Accordingly, "in a doubtful or marginal case a search under a warrant may be sustainable where without one it would fall." *United States v. Ventresca*, 380 U.S. 102, 106 (1965); *see also Leon*, 468 U.S. at 913-14 (same).

In short, an officer who has obtained a warrant is presumptively entitled to qualified immunity absent

evidence that egregious misconduct by the officers has defeated the warrant process.

### 3. Qualified immunity should be denied only in egregious cases.

Since the policy concerns underlying qualified immunity typically have been addressed when an officer procures or relies on a warrant, this Court has recognized that qualified immunity should be denied in only the most egregious cases, where it is patently inappropriate to presume that an officer acted in good faith.

Review of *Leon* makes this clear. There, in discussing when an officer's reliance on a warrant would not be considered "objectively reasonable," the Court enumerated four situations where an officer could not be deemed to be acting in good faith. The *en banc* majority relied on the fourth – where the warrant is "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable" – to deny qualified immunity. *Leon*, 468 U.S. at 923. (App.31.) Yet, this Court intended all four situations to address only egregious conduct that flagrantly violates Fourth Amendment rights – conduct of the sort not present here.

1. *The officer submitted an affidavit he "knew was false or would have known was false except for his reckless disregard of the truth." Leon*, 468 U.S. at 923. The court cited *Franks v. Delaware*, 438 U.S. 154 (1978), which held that a criminal defendant would

be entitled to an evidentiary hearing if he could show an officer made false statements in an affidavit "deliberate[ly]" or with "reckless disregard for the truth." *Franks*, 438 U.S. at 171. The Court there expressly stated that it was not extending the exclusionary rule beyond such instances, and where the police were "merely negligent in checking or recording the facts relevant to a probable-cause determination," the magistrate remained "the sole protection of the citizen's Fourth Amendment rights." *Franks*, 438 U.S. at 170-71; *see also Herring*, 555 U.S. at 145 (discussing *Franks*; "allegations of negligence or innocent mistake are insufficient").

2. *The magistrate "wholly abandoned his judicial role in the manner condemned in* Lo-Ji Sales, Inc. v. New York." *Leon*, 468 U.S. at 923. In *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319 (1979), the magistrate issued a warrant authorizing a search of an adult bookstore without specifying the items to be seized; at an officer's request, the magistrate then accompanied officers on the search, viewing films and magazines to determine, on the spot, whether they were obscene. The officers listed the seized items on the warrant *after* completing the search. *Id.* at 321-24. Not surprisingly, *Leon* commented that "in such circumstances, no reasonably well trained officer" would rely on the warrant. *Leon*, 468 U.S. at 923.

Dissenting from the denial of certiorari in *McCommon v. Mississippi*, 474 U.S. 984, 985-87 (1985) (mem.), Justice Brennan, joined by Justice Marshall, noted that an issuing judge also abandoned his

neutral role where he testified he relied on the mere fact that police officers had requested the warrant, rather than on the facts in the affidavit.[6]

3. *"[D]epending on the circumstances of the particular case, a warrant may be so facially deficient – i.e., in failing to particularize the place to be searched or the things to be seized – that the executing officers cannot reasonably presume it to be valid.* Cf. Massachusetts v. Sheppard." *Leon*, 468 U.S. at 923. As noted in *Groh*, the Fourth Amendment explicitly states that warrants must "particularly describ[e] the place to be searched, and the persons or things to be seized." *Groh*, 540 U.S. at 557 (emphasis omitted). Nevertheless, in *Massachusetts v. Sheppard*, 468 U.S. 981 (1984), where a warrant listed the wrong items for seizure after the magistrate told the officer he would make the necessary changes but failed to do so, and officers conducted the search within the scope of the warrant affidavit, the Court held that the exclusionary rule should not apply because the officers reasonably, albeit mistakenly, believed the warrant was valid. *Id.* at 986-90. By contrasting *Sheppard*, the Court in *Leon* recognized that even if a warrant was facially deficient, the officers' reliance on it could be

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[6] The Eighth Circuit similarly has held that an issuing judge abandoned his neutral role where he signed a warrant without reading it. *United States v. Decker*, 956 F.2d 773, 777-78 (8th Cir. 1992); *see also United States v. Martin*, 297 F.3d 1308, 1316-18 & n.10 (11th Cir. 2002) (discussing cases).

reasonable under the circumstances. *Leon*, 468 U.S. at 923.[7]

4. *The warrant affidavit is otherwise "'so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.'"* *Leon*, 468 U.S. at 923. As noted in the petition for certiorari, this final category of misconduct is hardly a model of clarity and, untethered to any specific standard, has led to an essentially ad hoc "I know it when I see it" approach among courts.

Given the premise of *Leon* and *Malley*, that an officer's seeking a warrant in the first instance bespeaks good faith, the standard for finding an application and warrant to be "so lacking in indicia of probable cause" was intended to be a high one. This is confirmed by *Leon*'s citation to concurring opinions in *Brown v. Illinois*, 422 U.S. 590 (1975) and *Illinois v. Gates*, 462 U.S. 213 (1983), from which the standard is gleaned.

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[7] *Leon* also noted that courts should not defer to a magistrate's determination of probable cause based on a purely conclusory or "bare-bones" affidavit unsupported by facts, which obviously could not give the magistrate a "substantial basis" for determining probable cause. *See Leon*, 914-15 & n.13 (citing *Aguilar v. Texas*, 378 U.S. 108, 111, 114-15 (1964); *Giordenello v. United States*, 357 U.S. 480, 485-87 (1958); *Nathanson v. United States*, 290 U.S. 41, 46-47 (1933)). Concurring in *Gates*, Justice White suggested that suppression would be appropriate in such circumstances. *Gates*, 462 U.S. at 263-64 (citing *Aguilar* and *Nathanson*).

In *Brown*, the defendant was arrested for questioning, without a warrant or probable cause, and was given the warnings prescribed by *Miranda v. Arizona*, 384 U.S. 436 (1966), before making inculpatory statements. *Brown*, 422 U.S. at 591. The Court held the *Miranda* warnings alone were insufficient to dissipate the taint of the unconstitutional arrest and render the statements admissible. *Id.* at 602-04.

Concurring in part, Justice Powell, joined by Justice Rehnquist, commented that whether the taint of the illegal arrest should be deemed purged depends on whether "the detrimental consequences of illegal police action [have] become so attenuated that the deterrent effect of the exclusionary rule no longer justifies its cost," which in turn depends on the nature of the taint. *Id.* at 609. The Justices distinguished between two "extremes." *Id.* at 610.

*Miranda* warnings would be insufficient to dissipate the taint of conduct "flagrantly abusive of Fourth Amendment rights," including cases where "the factors relied on by the police in determining to make the arrest were so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable," or where the arrest was pretextual. *Id.* at 610-11. It is not clear what was meant by "factors relied on by the police," but the phrasing suggests matters that are simply irrelevant or not logically connected to the question of whether probable cause exists – say, for example, where the police arrested someone solely because of race or sexual

orientation, or simply to procure information for an investigation.

Indeed, the officers' alleged conduct in *Brown* was egregious – an admission that they lacked probable cause and had arrested the defendant solely to glean information for their investigation – a point the majority believed was established, *id.* at 605, but the concurring Justices believed should be addressed on remand, *id.* at 613.

Significantly, Justices Powell and Rehnquist urged that *Miranda* warnings would generally suffice to purge the taint for "'technical' violations of Fourth Amendment rights where, for example, officers *in good faith arrest an individual in reliance on a warrant later invalidated* or pursuant to a statute that subsequently is declared unconstitutional." *Id.* at 611-12 (emphasis added). In such cases, the exclusionary rule's deterrent purpose would be little served by requiring more. *Id.* at 612. The Justices noted that such a rule would have "the added benefit of encouraging the police to seek a warrant whenever possible." *Id.* at 612 n.3.

*Leon* also cited *Gates*, 462 U.S. at 263-64, where, in concurring in the judgment, Justice White urged the Court to adopt a good-faith exception to the exclusionary rule. *Leon*, 468 U.S. at 923. Justice White noted that such a good-faith exception would not apply where a warrant affidavit is "so clearly lacking in probable cause" that no officer could reasonably believe a warrant should issue. *Gates*, 462 U.S. at

264; *see also id.* at 260 (citing *Brown* for "so lacking" standard). But he explained that a warrant "'normally suffices to establish[ ]' that a law enforcement officer has 'acted in good faith,'" and where a warrant is invalidated merely because of a "technical defect" or because "the judge issued a warrant on information later determined to fall short of probable cause," excluding evidence "can have no possible deterrent effect" except "to make officers less willing to do their duty" and to apply for warrants rather than relying on exceptions to the warrant requirement. *Id.* at 263. In short, Justice White also intended the "so lacking in indicia of probable cause" standard to signify extreme circumstances, far beyond simply guessing wrong about whether facts establish probable cause.

To the extent the "so lacking in indicia of probable cause" standard is nothing more than a different manner of phrasing the general qualified immunity inquiry of whether a defendant's conduct violated clearly established law, then as discussed, §II.B.1, *infra*, no such law would have put petitioners on notice that it was patently unreasonable even to seek a warrant here.

Yet, petitioners submit that it may be worthwhile to reconsider application of the "so lacking in indicia of probable cause" standard as a ground for rebutting the presumption that an officer has acted reasonably in procuring and relying on a warrant.

If an officer's entitlement to qualified immunity for purposes of a search or arrest boils down to an

inquiry as to whether the officer should have known his or her conduct violated clearly established law regardless of whether he or she sought a warrant, procuring a warrant affords the officer no additional protection. If this is so, then an officer, in borderline situations, may opt to effect a warrantless arrest or search in lieu of taking the time to seek a magistrate's approval – a result at odds with this Court's repeated statement that officers should be encouraged to seek warrants.

To the extent the purpose of the "so lacking in indicia of probable cause" inquiry is to deter officers from applying for warrants without any reasonable basis for doing so, the burden of imposing this inquiry on the courts, and spawning endless challenges to warrants based upon amorphous principles as to whether the law is clearly established, is not justified by the minimal deterrent effect. Officers have little incentive to submit a patently inadequate warrant application because in most circumstances, a reasonable magistrate will refuse the warrant. Moreover, the other factors articulated in *Leon* as rebutting a presumption that the officers acted in an objectively reasonable manner in procuring a warrant act as a check on routine or intentional submission of patently inadequate applications. "Bare-bones" affidavits, *i.e.*, those without any facts, typically could not establish probable cause. Similarly, an officer would likely submit patently incompetent warrant applications only to a magistrate who he or she knew did not in fact review them, thus falling into another of *Leon*'s clear exceptions.

But regardless of the standard employed, as *Malley* and *Leon* make plain, denial of qualified immunity and exclusion of evidence should be reserved only for those cases where the officer's misconduct is obvious and egregious. As we discuss, this case involves no flagrant abuse or gross incompetence. The officers acted reasonably in obtaining a warrant, and the surrounding circumstances confirm that they acted in objective good faith.

## II. THIS CASE DOES NOT PRESENT THE EGREGIOUS CONDUCT REQUIRED BY *LEON* AND *MALLEY* TO OVERCOME A PRESUMPTION THAT THE OFFICERS ACTED IN AN OBJECTIVELY REASONABLE MANNER IN PROCURING AND RELYING ON A WARRANT.

The Ninth Circuit *en banc* majority held the search warrant here was invalid in that it allowed a search and seizure of all firearms and not simply the sawed-off shotgun Bowen fired at Kelly. (App.24.) The majority also found the warrant invalid insofar as it allowed a search for evidence concerning gang affiliation because there was no indication the assault was gang-related. (App.28-29.) The majority further found the lack of probable cause was so clear that the officers were not entitled to qualified immunity – specifically, the warrant was "so lacking in indicia of probable cause" that no reasonable officer should apply for it. (App.3, 30, 35-36, 38.)

In short, in the language of *Malley*, the court essentially found that the officers were "plainly incompetent" or "knowingly violate[d] the law." *Malley*, 475 U.S. at 341. The majority so found even though two of its colleagues found probable cause to search for all firearms and three concluded the officers were entitled to qualified immunity. (App.41, 72-73.) As we show next, the majority erred. There was probable cause to search for both firearms and gang-related items, or at the very least, the officers could reasonably have believed so. Moreover, the circumstances surrounding procurement of the warrant, viewed objectively, confirm the officers acted in good faith. The officers therefore are entitled to qualified immunity.

### A. Probable Cause Supported the Warrant, or at Least the Officers Could Have Believed So.

Probable cause exists when, given the totality of the circumstances, "there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Illinois v. Gates*, 462 U.S. 213, 238 (1983). This requires "less than evidence which would justify condemnation," but rather "circumstances which warrant suspicion." *Id.* at 235; *id.* at 231 (probable cause deals not with "hard certainties" but "probabilities"). Moreover, probable cause is a "'practical, nontechnical conception'" that permits law enforcement officers to formulate "common-sense conclusions about human behavior." *Id.* at 231. Put differently, the search for evidence "must be seen . . . not in terms

of library analysis by scholars, but as understood by those versed in . . . law enforcement." *Id.* at 232.

Reviewing courts should pay "great deference" to a magistrate's determination of probable cause. *Id.* at 236. "[D]oubtful or marginal cases . . . should be largely determined by the preference to be accorded to warrants," and "courts should not invalidate . . . warrants by interpreting affidavits in a hypertechnical, rather than a common sense, manner." *Id.* at 236, 237 n.10. Otherwise, "police might well resort to warrantless searches" with the hope of relying on an exception to the warrant requirement that might develop at the time of the search. *Id.* at 236.

### 1. There was probable cause to search for all firearms at plaintiffs' residence.

As the dissent observed, the real object of the search and accompanying arrest warrant was Bowen, who Messerschmidt believed was living or staying at plaintiffs' residence. (JA25-26, 55-61; App.41.) Bowen was reasonably considered armed and dangerous. He had recently threatened to kill his girlfriend, had attempted to do so by firing five rounds from a sawed-off shotgun at her in public, and was a member of a street gang, a group organized for criminal activity and known to use firearms illegally on people. (JA18-21, 24, 28-29, 56-59; App.41-42.)

Messerschmidt's affidavit recounted his extensive experience investigating gang activity, including

"concealment of weapon(s) used in [gang-related] assaults." (JA53-54.) Messerschmidt also knew Bowen had previous felony convictions and was a "third strike candidate" under California law. (JA21, 29; App.8, 41-42 & n.1.) Because of Bowen's dangerousness, the magistrate approved the warrant for night service, and the district court found such service justified. (JA49, 323-27; App.41.)

Given the circumstances, the officers had probable cause to search for and seize all firearms in plaintiffs' residence.

First, the officers could reasonably conclude there was a fair probability Bowen had other firearms besides the sawed-off shotgun he had fired at Kelly. Many people who own guns own more than one, and it was particularly reasonable to infer that Bowen did, given that he was a gang member, possessed a sawed-off shotgun – an illegal weapon associated with violent crime – and did not hesitate to fire it repeatedly at a person in public. (JA18-21, 24, 28-29, 56-59.) *See* Cal. Penal Code §12020(a)(1) & (c)(1) (criminalizing possession of a short-barreled shotgun); *People v. Stinson*, 87 Cal.Rptr. 537, 538-39 (Cal.Ct.App. 1970) (sawed-off shotguns are "weapons common to the 'criminal's arsenal'"); *People v. Favalora*, 117 Cal.Rptr. 291, 293 (Cal.Ct.App. 1974) (similar reasoning); *United States v. Roach*, 582 F.3d 1192, 1199 (10th Cir. 2009) (expert testified that firearms are "tools of the trade" that gang members "carry or maintain"); *Chicago Housing Authority v. Rose*, 560 N.E.2d 1131, 1133-34 (Ill.App.Ct. 1990) (gang-specialist officer opined that a person in

possession of a sawed-off shotgun is likely a gang member). Moreover, Bowen was an ex-felon with an extensive criminal background that included numerous assault and weapons charges. (JA21, 28, 70-80.) Given these circumstances, it would be surprising if he did *not* have other firearms.

Indeed, courts have repeatedly recognized the close nexus between guns and serious criminal activity. California courts have observed that persons involved in dealing illegal drugs almost invariably possess firearms. *E.g.*, *People v. Simpson*, 76 Cal.Rptr.2d 851, 856-57 (Cal.Ct.App. 1998) (experienced narcotics officer reasonably anticipated that suspect dealing illegal drugs would keep guns in home); *People v. Bland*, 898 P.2d 391, 400 (Cal. 1995) ("[d]rug dealers are known to keep guns"). Numerous circuit courts have held the same. *See United States v. Singer*, 943 F.2d 758, 762-63 (7th Cir. 1991) ("firearms are an integral part of the drug trade," justifying no-knock entry to execute search warrant); *United States v. Bonner*, 874 F.2d 822, 824 (D.C. Cir. 1989) (similar reasoning); *United States v. Wiener*, 534 F.2d 15, 18 (2d Cir. 1976) (narcotics dealers "keep firearms on their premises as tools of the trade").

Indeed, the Eighth Circuit has upheld a warrant to search for all "firearms and ammunition" based on an officer's sighting of a marijuana pipe and stem, because firearms are "commonly associated with drug trafficking activity." *United States v. Jansen*, 470 F.3d 762, 766 (8th Cir. 2006); *see also United States v. Perry*, 560 F.3d 246, 251 (4th Cir. 2009) (upholding

warrant to search for "firearms" based on cocaine sales); *People v. Zuccarini*, 431 N.W.2d 446, 449 (Mich.Ct.App. 1988) (upholding warrant to search for "[a]ll firearms" where affidavit indicated residence was drug trafficking site).

If firearms are tools of the drug trade so as to justify a search for them in connection with investigation of drug dealing, surely there is probable cause to search for all firearms in connection with a crime that actually involves use of a firearm. Moreover, it is particularly logical to assume that a gang member has guns, particularly when he already possesses a sawed-off shotgun and has shown a propensity to use it.

Second, the officers could reasonably infer there was a fair probability any guns Bowen possessed might be found at plaintiffs' residence, anywhere on the premises. The affidavit explained that Messerschmidt had extensive experience investigating gang activity, including "the concealment of weapon(s) used in [gang-related] assaults." (JA53-54, 16-18.) And as the district court found, Messerschmidt reasonably believed Bowen was living or "hiding out" at plaintiffs' residence. (JA21-23, 25-26, 307-11, 317-19.) It was logical to assume Bowen would keep his weapons there. Even if Bowen was only staying at plaintiffs' residence temporarily, as plaintiffs have asserted, he might keep his weapons there to protect himself, or to hide them from the authorities or other gang members.

Messerschmidt could also reasonably believe Bowen would have access to the entire premises and could hide his weapons anywhere on the premises, with or without other residents' assistance. *See Chicago Housing Authority,* 560 N.E.2d at 1133-34 (gang-specialist officer testified gang members often hide guns in homes of "unsuspecting family members" and "do not disclose the presence of these guns to their relatives").

Third, the officers could reasonably believe any such guns were subject to seizure for multiple other reasons.

California law allows issuance of a search warrant for items possessed "with the intent to use them as a means of committing a public offense." Cal. Penal Code §1524(a)(3); *see also People v. Enskat*, 109 Cal.Rptr. 433, 443-44 (Cal.Ct.App. 1973) (§1524 permitted seizure of object where affidavit contained facts suggesting suspect intended to use it to commit crime); *People v. Green*, 156 Cal.Rptr. 713, 717 (Cal.App. Dep't Super.Ct. 1979). The warrant recited this authorization. (JA48.) Thus, the officers could legitimately seize all firearms Bowen might use to carry out his threat to kill Kelly.

Moreover, numerous laws render it criminal for felons to possess firearms. *E.g.*, Cal. Penal Code §12021(a)(1); 18 U.S.C. §922(g); *see also People v. Pepper*, 48 Cal.Rptr.2d 877, 879-80 (Cal.Ct.App. 1996). Thus, as the dissent noted, there was at least a "fair probability" that firearms at plaintiffs' residence

would be "contraband or evidence of a crime." (App.42.) Significantly, other circuits have held that a warrant to search for all firearms at a convicted felon's residence is not overbroad even if the alleged crime involved a specific weapon, because felons cannot lawfully possess firearms. *United States v. Campbell*, 256 F.3d 381, 389 (6th Cir. 2001); *United States v. Sanders*, 351 F.App'x 137, 139 (7th Cir. 2009).

Finally, because firearms are inherently dangerous, as the dissent explained, the officers' and residents' safety required that "officers seeking the nighttime arrest of a dangerous felon be allowed to seize any firearm that they [might] come across in their search for that individual or for evidence . . . otherwise properly covered by the search warrant. Indeed, securing any weapons found during the search [was] justified to protect the officers executing the warrant from harm while doing so." (App.42-43.)

Courts have validated this reasoning in other contexts. For example, the Ninth Circuit has held that in conducting a warrantless inspection on a boat and learning that there were firearms below deck, Coast Guard officers were justified in securing those weapons to ensure the officers' safety. *United States v. Humphrey*, 759 F.2d 743, 748 (9th Cir. 1985). In enacting California Penal Code §12021(a)(1), which makes it a crime for convicted felons to possess firearms, the California Legislature recognized that felons are "more likely to use [firearms] for improper purposes" and attempted to "protect the public welfare" by

precluding those persons from possessing guns. *Pepper*, 48 Cal.Rptr.2d at 881-82.

California courts have also recognized that officers may reasonably anticipate and take precautions against firearms when searches involve gang or illegal drug activity. *See Simpson*, 76 Cal.Rptr.2d at 856-57 (officer executing search warrant for drugs reasonably questioned suspect about guns without *Miranda* warnings; officer could reasonably anticipate suspect and others present would possess and use weapons); *People v. Gallegos*, 117 Cal.Rptr.2d 375, 388 n.13 (Cal.Ct.App. 2002) (temporary seizure of firearms during search of gang member's residence was "'a reasonable precaution to assure the safety of all persons on the premises during the search'"); *People v. Glazer*, 902 P.2d 729, 735 (Cal. 1995) (recognizing police interest in protecting against violence during narcotics search because firearms are "'tools of the trade'"). Circuit courts have applied similar reasoning. *Bonner*, 874 F.2d at 824-25; *Singer*, 943 F.2d at 762-63.

In short, probable cause supported the warrant's authorization to search for all firearms and firearm-related materials at plaintiffs' residence. At the very least, as required for qualified immunity, a reasonable officer could believe the above facts established probable cause, and submit any doubt to a magistrate.

### 2. Any information inadvertently omitted from the warrant affidavit was unnecessary to establish probable cause, and in any event was a reasonable "mistake of fact" to which qualified immunity applies.

The *en banc* majority noted the warrant affidavit did not explicitly say Bowen was a convicted felon and a "third strike" candidate, nor enumerate Bowen's extensive criminal history, although Messerschmidt undisputedly knew these facts when he sought the warrant. (App.8, 25 & n.7; JA21, 28-29.) But these facts could reasonably be inferred from the affidavit's other facts – specifically, the nature of the crime, the type of weapon used, and Bowen's gang membership.[8] (JA55-59.) Even if the officers had not known Bowen was a felon and a "third strike" candidate, the affidavit's other facts are sufficient to support the magistrate's determination that probable cause existed to search for firearms and firearm-related materials – or, more important, a reasonable officer could believe so.

Even assuming the warrant was in fact deficient because the affidavit did not say Bowen was a felon and a "third strike" candidate, this omission was a reasonable "mistake of fact" to which qualified immunity applies. This Court has repeatedly stated that

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[8] Moreover, the affidavit stated that Messerschmidt knew Bowen was a Mona Park Crip gang member based partly on information in "the cal-gang data base." (JA59; App.41 n.1.)

qualified immunity "applies regardless of whether [an officer's] error is 'a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact.'" *Pearson v. Callahan*, 555 U.S. 223, 231 (2009); *Groh*, 540 U.S. at 567 (Kennedy, J., dissenting); *see also Butz v. Economou*, 438 U.S. 478, 507 (1978) (public officials "will not be liable for mere mistakes in judgment, whether the mistake is one of fact or one of law").

For example, in *Groh*, Justice Kennedy and Chief Justice Rehnquist concluded that the officer's failure to notice he had made a clerical error in filling out the warrant was a reasonable mistake, given the numerous "serious responsibilities" he had to fulfill in executing a search warrant for illegal weapons, including "difficult and important tasks" that demanded his "full attention in the heat of an ongoing and often dangerous criminal investigation." *Groh*, 540 U.S. at 567-68 (Kennedy, J., dissenting). Justice Thomas similarly noted the officer's mistake was objectively reasonable "[g]iven the sheer number of warrants prepared and executed by officers each year," including "detailed" and often lengthy supporting documents. *Id.* at 579 (Thomas, J., dissenting).

Similarly, in the criminal context, this Court has repeatedly found that officers acted in objective good faith, and has refused to suppress evidence obtained, where officers have arrested suspects or conducted searches based on reasonable but mistaken assumptions. *Herring v. United States*, 555 U.S. 135, 146-47 (2009) (police mistakenly arrested suspect due to

police employee's negligent record-keeping error); *Maryland v. Garrison*, 480 U.S. 79, 87-88 (1987) (executing officers reasonably failed to recognize warrant was overbroad because premises contained two apartments rather than one); *Sheppard*, 468 U.S. at 988-90 (magistrate failed to make corrections to warrant form); *Arizona v. Evans*, 514 U.S. 1, 15-16 (1995) (police reasonably relied on mistaken information in court's database). The Court has reasoned that where the mistake is at most negligent, suppressing the evidence would not serve the exclusionary rule's aim of deterring police misconduct. *Herring*, 555 U.S. at 147-48; *see Sheppard*, 468 U.S. at 991.

The circuit courts have applied similar reasoning. The Sixth Circuit has applied qualified immunity where officers acted reasonably in making cognitive mistakes. *Humphrey v. Mabry*, 482 F.3d 840, 849 (6th Cir. 2007) (officers stopped blue vehicle despite information that the wanted vehicle was gray). The Second, Fifth, Sixth and Eighth Circuits have found that officers acted reasonably, given the circumstances, in relying on warrants later determined invalid because of technical defects or clerical errors, and have distinguished *Groh* to apply the good-faith exception. *See United States v. Guzman*, 507 F.3d 681, 685-86 (8th Cir. 2007) (affidavit failed to establish probable cause, but officer presented incident report containing additional facts to magistrate); *United States v. Watson*, 498 F.3d 429, 432-33 (6th Cir. 2007) (warrant's grant-of-authority section omitted residence to be searched due to a "clerical error" but warrant

described premises); *United States v. Rosa*, 626 F.3d 56, 64-66 (2d Cir. 2010) (overbroad warrant failed to link items to suspected criminal activity, but supporting documents contained that information); *United States v. Allen*, 625 F.3d 830, 839-40 (5th Cir. 2010) (overbroad warrant insufficiently described items to be seized, but multiple officers and U.S. Attorney reviewed warrant documents and magistrate signed affidavit listing items); *see also United States v. Capozzi*, 347 F.3d 327, 332 (1st Cir. 2003) (minor errors in affidavit reflected "[m]ere negligence or inattention to detail").

Here, even if the warrant affidavit should have stated Bowen was a felon and a "third strike" candidate, the omission was a reasonable mistake given the circumstances. Unlike in *Groh*, where this Court noted that "even a cursory reading of the warrant . . . would have revealed a glaring deficiency that any reasonable police officer would have known was constitutionally fatal," here the purported defect could not be detected without careful analysis. *See Groh*, 540 U.S. at 564. Moreover, the affidavit was not "barebones" and conclusory. *See Leon*, 468 U.S. at 915; *Gates*, 462 U.S. at 239. Rather, it detailed Bowen's attempt to kill Kelly, Messerschmidt's background search on Bowen, Messerschmidt's experience with gangs and their use of weapons, and why night service was necessary. (JA53-59.) In the course of investigating Bowen's crime and performing the numerous tasks surrounding obtaining and executing the warrant, Messerschmidt could reasonably fail to

recognize that he had omitted this information. *See Groh*, 540 U.S. at 567-68 (Kennedy, J., dissenting), 579 (Thomas, J., dissenting).

### 3. There was probable cause to search for gang-related items, or at least the officers could reasonably have submitted the issue to the magistrate.

The *en banc* majority also found that the warrant's authorization to search for gang-related items was overbroad and the officers were not entitled to qualified immunity for that aspect of the warrant. But as the dissent explained, when Messerschmidt prepared his affidavit, he knew Bowen had fired a sawed-off shotgun at a person in public, and was a felon and gang member. (JA20-21, 24, 28-29, 56-59; App.63.) The affidavit recounted Messerschmidt's extensive training and experience in crimes involving gang members, including the "manners in which gang-related assaults are committed, the motives for such assaults, and the concealment of weapon(s) used in such assaults." (JA53-54; App.64 n.17.) "[A] police officer may draw inferences based on his own experience in deciding whether probable cause exists." *Ornelas v. United States*, 517 U.S. 690, 700 (1996).

Moreover, California law criminalizes possession of sawed-off shotguns, and Messerschmidt could reasonably have thought Bowen's possession of the gun might be related to his gang affiliation. *See* Cal. Penal Code §12020(a)(1); *see United States v. Roach*, 582

F.3d 1192, 1199 (10th Cir. 2009) (expert testified that firearms are "tools of the trade" for gang members); *Chicago Housing Authority v. Rose*, 560 N.E.2d 1131, 1133-34 (Ill.App.Ct. 1990) (gang-specialist officer opined that a person in possession of a sawed-off shotgun is likely a gang member). Or, that his connection to a gang was relevant to his procurement or concealment of such a weapon. (*See* App.64.)

In addition, as Judge Silverman explained in his dissent, "[h]ad Mona Park Crip paraphernalia been found in close proximity to guns during the search of [plaintiffs'] house – say, a gun concealed in Mona Park Crip clothing – such a discovery would have tended to prove that the guns were Bowen's" and not plaintiffs'. (App.75.) Since Bowen was not the only person at plaintiffs' residence, this evidence might be critical to connect Bowen to any firearms found there.

In short, there was probable cause to search for gang-related items. At the very least, for qualified immunity purposes, Messerschmidt could reasonably have thought there might be sufficient probable cause to submit the issue to a magistrate for determination.

### B. The Circumstances Surrounding Procurement of the Warrant Confirm That the Officers Acted in Objective Good Faith.

As shown, even if this Court decides the warrant's authorization to search for firearms and gang-related items was overbroad, the officers are entitled

to qualified immunity because they could reasonably have believed probable cause supported the warrant. In *Leon*, this Court stated that in determining whether an officer's reliance on a warrant was "objectively reasonable," "all of the circumstances" should be considered. *Leon*, 468 U.S. at 922 & n.23; *see also United States v. Frazier*, 423 F.3d 526, 533 (6th Cir. 2005) (same); *United States v. Martin*, 297 F.3d 1308, 1318-19 (11th Cir. 2002) (in determining whether a reasonable officer would have known a search was illegal despite a warrant, courts should consider the "'totality of the circumstances'").

Here, the circumstances surrounding procurement of the warrant manifest the officers' good faith and confirm that they acted reasonably in relying on the magistrate's finding of probable cause.

### 1. The law did not clearly establish that the warrant was overbroad.

As mentioned, an officer is entitled to qualified immunity if "a reasonable officer could have believed [his or her actions] lawful, in light of clearly established law and the information the officer[] possessed." *Wilson*, 526 U.S. at 615; *Anderson*, 483 U.S. at 641. This Court has repeatedly admonished that whether the law is clearly established must be determined "'in light of the specific context of the case, not as a broad general proposition.'" *Brosseau*, 543 U.S. at 198; *see also al-Kidd*, 131 S.Ct. at 2084 (admonishing courts "not to define clearly established

law at a high level of generality"); *Groh*, 540 U.S. at 578 (Thomas, J., dissenting).

For example, "[t]he general proposition . . . that an unreasonable search or seizure violates the Fourth Amendment" does not help determine "whether the violative nature of particular conduct is clearly established." *al-Kidd*, 131 S.Ct. at 2084. Given "the difficulty of determining whether particular searches or seizures comport with the Fourth Amendment," applying the standard at this level of generality would be inconsistent with the "objective reasonableness" standard and would allow plaintiffs "to convert the rule of qualified immunity . . . into a rule of virtually unqualified liability simply by alleging a violation of extremely abstract rights." *Anderson*, 483 U.S. at 639, 644; *Groh*, 540 U.S. at 578 (Thomas, J., dissenting). Accordingly, the right allegedly violated "must have been 'clearly established' in a more particularized . . . sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson*, 483 U.S. at 640; *see also Wilson*, 526 U.S. at 614-15 (same).

More specifically, this Court has said that an officer must have "fair notice that her conduct was unlawful." *Brosseau*, 543 U.S. at 198; *Hope v. Pelzer*, 536 U.S. 730, 740-41 (2002). Although the Court "do[es] not require case directly on point, . . . existing precedent must place the . . . constitutional question beyond debate." *al-Kidd*, 131 S.Ct. at 2083. Absent "'controlling authority'" in the relevant jurisdiction,

"a robust 'consensus of cases of persuasive authority'" is required. *Id.* at 2084 (citing *Wilson*, 526 U.S. at 617).

Moreover, while not dispositive, the fact that judges "disagree[] about the contours of a right" suggests the relevant law was not clearly established. *See Safford Unified School Dist. v. Redding*, 129 S.Ct. 2633, 2644 (2009) (cases "viewing school strip searches differently . . . are numerous enough" to suggest law was not clearly established); *see also al-Kidd*, 131 S.Ct. at 2085 (government official was not plainly incompetent or knowingly violating the law, "not least because eight Court of Appeals judges agreed with his judgment in a case of first impression"); *Wilson*, 526 U.S. at 618 ("[i]f judges . . . disagree . . . , it is unfair to subject the police to money damages for picking the losing side of the controversy"); *Leon*, 468 U.S. at 926 (officers' reliance on warrant was "objectively reasonable" where "thoughtful and competent judges" disagreed whether probable cause existed).

Here, as the dissent noted, no case law would have put the officers on notice their conduct was improper, let alone so improper as to render them, in the language of *Malley*, "incompetent" or knowingly violating the law. *Malley*, 475 U.S. at 341. The Ninth Circuit had previously found warrants unconstitutionally overbroad and refused to apply the exclusionary rule's good-faith exception in two cases involving warrants that were obviously invalid on their faces. *See United States v. Kow*, 58 F.3d 423, 428-29 (9th Cir. 1995); *United States v. Stubbs*, 873 F.2d 210, 212 (9th Cir. 1989); *see also KRL v. Estate of Moore*, 512

F.3d 1184, 1190 (9th Cir. 2008) (discussing *Kow* and *Stubbs*). (*See* App.65-66 [discussing *Kow* and *Stubbs*].) On the other hand, the Ninth Circuit had applied qualified immunity in *Ortiz v. Van Auken*, 887 F.2d 1366, 1367-68 (9th Cir. 1989), where officers sought a warrant to search a home for weapons and explosives based only on four anonymous telephone calls apparently by the same person. Although the warrant lacked probable cause, the court held the officers reasonably relied on it partly because a deputy district attorney as well as the issuing judge had approved the warrant, and the warrant was not facially overbroad. *Id.* at 1370. (*See* App.55-56 & n.11.)

Moreover, plaintiffs have never cited "a robust 'consensus of cases'" in other jurisdictions clearly establishing that given the circumstances, the warrant's authorization to search for firearms and gang-related items was overbroad, not to mention "so lacking in indicia of probable cause" that the officers could not reasonably have believed it was valid. *See al-Kidd*, 131 S.Ct. at 2084; *Malley*, 475 U.S. at 344-45.

Finally, two dissenting judges believed there was probable cause to search for firearms, and three believed the relationship between Bowen's gang affiliation, his crime, the presence of firearms, and the danger presented by the search would lead a reasonable officer to believe there might be probable cause to search for indicia of gang membership as well as firearms. (App.41-45, 63-64, 74-75.) This disagreement suggests the officers could not have been "incompetent" or knowingly violating the law by relying on the magistrate's determination of probable cause.

**2. The warrant was facially valid.**

As discussed, in *Groh*, this Court denied qualified immunity where officers executed a warrant that completely failed to list the items to be searched. *Groh*, 540 U.S. at 563-65. The Court reasoned that the Fourth Amendment's particularity requirement unambiguously requires that a warrant "particularly describ[e] . . . the things to be seized," and "even a cursory reading of the warrant" would have revealed the "glaring deficiency." *Id.* at 557-58, 564 (emphasis omitted). Thus, no "reasonable officer" could believe the warrant valid. *Id.* at 563. In dissent, four members of this Court concluded the officers nonetheless were entitled to qualified immunity because they made a reasonable "mistake" in overlooking this "clerical error." *Id.* at 567-68 (Kennedy, J., dissenting), 579 (Thomas, J., dissenting).

Here, in contrast, no facial invalidity notified the officers the warrant was unconstitutionally overbroad. As the dissent noted, both the arrest warrant and the search warrant "adequately identified the location to be searched, the person to be arrested, and the items to be seized. Regardless of whether there was probable cause to search for firearms and indicia of gang membership, these limited items were properly identified on the face of the warrant." (App.61.) The officers would have had to analyze the warrant affidavit carefully to determine any deficiency.

### 3. The warrant was supported by a detailed, as opposed to "bare-bones" affidavit.

In *Leon*, the Court declined to suppress evidence obtained under a warrant based on an affidavit that failed to indicate the informants' reliability and basis for their statements. *Leon*, 468 U.S. at 904-05, 925-26. The Court held the officers' reliance on the magistrate's determination of probable cause was "objectively reasonable" because "much more than a 'bare bones' affidavit" supported the warrant. *Id.* at 926. The affidavit "related the results of an extensive investigation" and, indeed, "provided evidence sufficient to create disagreement among thoughtful and competent judges" (including the issuing judge) concerning probable cause. *Id.* at 926.

The Court explained that a "bare-bones" affidavit, in contrast, does not provide the magistrate with "a substantial basis for determining the existence of probable cause," so that in such situations, the magistrate obviously could not "perform his neutral and detached function" and must have served "merely as a rubber stamp for the police." *Leon*, 468 U.S. at 914-15 (internal quotation marks omitted).[9]

Following *Leon*, virtually every circuit has found that officers acted in objective good faith, and has

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[9] The Second Circuit has noted that this concern "is particularly acute when facts indicate that the 'bare-bones description . . . was almost calculated to mislead.'" *United States v. Clark*, 638 F.3d 89, 103 (2d Cir. 2011).

applied the good-faith exception, where an affidavit provided detailed factual allegations in support of a facially valid warrant.

*See*: *United States v. Clark*, 638 F.3d 89, 103-04 (2d Cir. 2011) (affidavits providing "detailed factual allegations" "almost invariably demonstrate reasonable reliance" on the magistrate); *United States v. Capozzi*, 347 F.3d 327, 334 (1st Cir. 2003) (detailed affidavit "supports [officer's] good faith in seeking the warrant"); *United States v. Maggitt*, 778 F.2d 1029, 1036 (5th Cir. 1985) (affidavit "disclosed in detail the results of a careful and thorough investigation"); *United States v. Michaelian*, 803 F.2d 1042, 1047 (9th Cir. 1986); *United States v. Stearn*, 597 F.3d 540, 562 (3d Cir. 2010); *United States v. Mitten*, 592 F.3d 767, 771-73 (7th Cir. 2010); *United States v. Grant*, 490 F.3d 627, 633 (8th Cir. 2007); *United States v. Nolan*, 199 F.3d 1180, 1185 (10th Cir. 1999); *United States v. Martin*, 297 F.3d 1308, 1314-15 (11th Cir. 2002); *United States v. DeQuasie*, 373 F.3d 509, 522, 524 (4th Cir. 2004).

Here, similarly, a detailed affidavit supported the warrant. Messerschmidt's seven-page affidavit recounted his extensive experience as a gang investigator, detailed the assault on Kelly and Messerschmidt's investigation of Bowen, and explained why night service was necessary. (JA53-59.) As in *Leon*, the affidavit provided "evidence sufficient to create disagreement among thoughtful and competent judges" – including not only the issuing magistrate but two Ninth Circuit judges – as to the existence of probable cause. *See*

*Leon*, 468 U.S. at 926. The concerns expressed in *Leon* about "bare-bones" warrants – an egregious situation patently demonstrating that the magistrate could not have performed his or her gatekeeping duty – are absent here. Rather, to notice any constitutional deficiency, the officers would have had to scour the affidavit with the mindset of legal technicians or lawyers preparing a case for trial, not officers "versed in . . . law enforcement" conducting a criminal investigation. *Gates*, 462 U.S. at 232.

**4. The officers' supervisor and an attorney reviewed the warrant before the magistrate approved it.**

In *Leon*, this Court held officers acted reasonably in relying on a magistrate's determination of probable cause where, among other things, several district attorneys reviewed the warrant application. *Leon*, 468 U.S. at 902, 926. In *Massachusetts v. Sheppard*, the Court noted that by preparing an affidavit that was reviewed and approved by the district attorney and then the judge who issued a search warrant, the officers "took every step that could reasonably be expected of them." *Sheppard*, 468 U.S. at 989 (applying good-faith exception).

Numerous circuit courts have also found in the suppression context that review of an affidavit by a supervisor or an attorney suggests that an officer has acted in objective good faith in seeking a warrant.

*See*: *United States v. Allen*, 625 F.3d 830, 837-38 (5th Cir. 2010) (agent who submitted warrant papers to colleagues and U.S. Attorney's office for review "clearly attempted to perform his duty" and had "good reason to believe in the warrant's validity"); *United States v. Bynum*, 293 F.3d 192, 198 (4th Cir. 2002) (officer's consultation with prosecutor before seeking warrant "provides additional evidence of his objective good faith"); *United States v. Capozzi*, 347 F.3d 327, 334 (1st Cir. 2003) (similar reasoning); *United States v. Tuter*, 240 F.3d 1292, 1299-1300 (10th Cir. 2001) (suggesting that contacting attorney for advice on probable cause evidences good faith); *United States v. Fama*, 758 F.2d 834, 837 (2d Cir. 1985) (AUSA's approval of affidavit "supported an objectively reasonable belief in probable cause"); *United States v. Freitas*, 856 F.2d 1425, 1431-32 (9th Cir. 1988) (officers "were not required to disbelieve" AUSA who approved warrant provisions).

Here, as the dissent noted, Messerschmidt "scrupulously followed the proper procedures in seeking the arrest and search warrants," including having the warrant and affidavit reviewed by Sergeant Lawrence, a lieutenant, and a deputy district attorney, before a magistrate approved them. (JA27-28; App.62.) These actions attest to the officers' good faith in procuring and relying on the warrants.

### 5. Probable cause supported the search, even if the affidavit omitted some facts establishing probable cause.

As discussed, there was probable cause to search for firearms and firearm-related materials at plaintiffs' residence because, among other things, Bowen was a convicted felon and was prohibited from possessing firearms. (*See* §II.A.1, *supra*.) The *en banc* majority refused to consider this information because the affidavit did not mention Bowen's prior felonies. (App.22-27 & n.7.)

But in determining whether an officer acted in objective good faith in relying on a warrant, a majority of circuits in the suppression context have considered facts known to the officer and inadvertently omitted from the affidavit. *See United States v. Martin*, 297 F.3d 1308, 1318-19 (11th Cir. 2002) (collecting cases from First, Fourth, Sixth, Eighth, and Tenth Circuits).

Notably, the Eleventh Circuit has explained that in determining whether a reasonable officer would have known a search was illegal despite the magistrate's authorization, the "'totality of the circumstances'" should be considered, including facts not presented to the issuing judge. *Martin*, 297 F.3d at 1318-19. Moreover, the exclusionary rule (and civil liability) "is meant to guard against police officers who purposely leave critical facts out of search warrant affidavits because these facts would *not* support a finding of probable cause" – not officers acting in good faith who inadvertently fail to include facts that

would bolster their showing of probable cause. *Id.* at 1320. In short, no officer has any incentive to leave out facts that would help in obtaining a warrant.

Here, Messerschmidt had every incentive to disclose to the magistrate all of the facts he knew supporting probable cause, including that Bowen was a convicted felon. He simply overlooked this point. The oversight was reasonable, considering that his affidavit described at length Bowen's explosive attempt to kill Kelly and his investigation of Bowen's background, stated that Bowen was a gang member, and explained why Messerschmidt believed night service was necessary. (JA55-59; see §II.B.2, *supra*.)

### 6. The warrant's purported overbreadth did not expand the scope of the search beyond areas properly searched even if the warrant were narrowly tailored.

In *Groh*, Justice Kennedy, joined by Chief Justice Rehnquist, noted in dissent that plaintiffs did not "make the usual claim that they were injured by a defect that led to an improper search," but rather claimed they were injured simply because the warrant form was improper. *Groh*, 540 U.S. at 570-71. These Justices reiterated the Court's admonition that "'the purpose of encouraging recourse to the warrant procedure' can be served best by rejecting overly technical standards when courts review warrants," and that "qualified immunity 'provides ample protection

to all but the plainly incompetent or those who knowingly violate the law.'" *Id.* at 571. In light of these principles, the Justices concluded the officers were entitled to qualified immunity. *Id.*

Similarly, in dissent, Justice Thomas, joined by Justice Scalia, concluded the search was reasonable partly because the officers "conducted the search entirely . . . within the scope of what the Magistrate had authorized." *Id.* at 576.

The Court denied qualified immunity because the warrant was "plainly invalid" on its face. *Id.* at 557, 563-65. Had the warrant been facially valid (though otherwise defective), the Court might have agreed with the dissenting Justices.

In *Sheppard*, this Court found that officers acted reasonably in relying on a warrant that authorized a search for the wrong items, noting that "[t]he scope of the . . . search was limited to the items listed in the affidavit." *Sheppard*, 468 U.S. at 987-88. The Court found the exclusionary rule inapplicable. *Id.* at 987-91.

Similarly, in *United States v. Rosa*, 626 F.3d 56 (2d Cir. 2010), the Second Circuit declined to suppress evidence obtained under an overbroad warrant that authorized an uncircumscribed search of defendant's electronic equipment, rather than only electronic media relating to child pornography for which the affidavit established probable cause. *Id.* at 61-62, 64-66. In finding that the officers acted reasonably, the court noted that the officers searched for and

seized only items for which probable cause had been shown. *Id.* at 64-66.

Here, the majority noted that a sawed-off shotgun can be broken down into separate pieces for easy concealment, but concluded the officers' probable cause extended only to the disassembled pieces of the sawed-off shotgun Bowen fired at Kelly. (App.20.) As the dissent noted, given that the officers had probable cause to search for disassembled parts of the shotgun, the officers were "entitled to search anywhere that any firearm might be hidden." (App.43 & n.4.) In other words, allowing the search for other firearms or gang-related items did not expand the areas the officers could search beyond those that might also contain part of a disassembled shotgun. (*Id.*) Accordingly, applying qualified immunity here is consistent with this Court's direction not to apply hypertechnical standards when reviewing warrants. *See Gates*, 462 U.S. at 231, 235-37 n.10; *Groh*, 540 U.S. at 571 (Kennedy, J., dissenting).

### 7. The totality of the circumstances confirms that the officers acted in objective good faith in relying on the magistrate's determination of probable cause.

This case presents none of the egregious circumstances enumerated in *Leon* that would show bad faith or incompetence: the district court found that Messerschmidt did not intentionally or recklessly

misrepresent the facts in his affidavit (JA311-19); the warrant was not facially invalid, nor was it based on a "bare-bones" affidavit; and there is no evidence the magistrate acted in other than a neutral, detached manner. *See Leon*, 468 U.S. at 923; *see also id.* at 914-15 & n.13. Nor is there any other evidence of bad faith. To the contrary, as shown, the affidavit contained facts supporting, if not probable cause, then at least a close call – enough to convince two Ninth Circuit judges that probable cause existed. Moreover, all of the circumstances surrounding procurement of the warrant, viewed objectively, demonstrate that the officers acted in good faith in submitting the issue to a magistrate.

In short, the officers "took every step that could reasonably be expected of them." *Sheppard*, 468 U.S. at 989; *see also United States v. Bynum*, 293 F.3d 192, 200 (4th Cir. 2002) (King, J., concurring; officers "did most everything right," where they prepared a detailed affidavit, had it reviewed and approved by the prosecutor and then a judge, and executed the warrant in good faith). Their seeking and relying on the magistrate's determination of probable cause was "objectively reasonable," and they are entitled to qualified immunity.

## CONCLUSION

For the reasons stated, petitioners are entitled to qualified immunity. The Ninth Circuit's judgment should be reversed, with directions to vacate the district court's order insofar as it denies qualified immunity to petitioners, and to enter judgment for petitioners.

Respectfully submitted,

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# RESPONDENT'S BRIEF

No. 10-704

IN THE

# Supreme Court of the United States

CURT MESSERSCHMIDT, ET AL.,
*Petitioners,*

*v.*

AUGUSTA MILLENDER, ET. AL,
*Respondents.*

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

## BRIEF FOR RESPONDENTS


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## QUESTIONS PRESENTED

1. Whether police officers are entitled to qualified immunity for obtaining a warrant to search the residence of an innocent third party, where that warrant was plainly defective because it authorized a sweeping search for and seizure of any and all firearms, any gang-related items, and any photographic evidence of any criminal activity, even though the police only had reason to search for a specifically-identified firearm and knew the offense in which that firearm was used was not gang-related.

2. Whether this Court should overturn decades of settled jurisprudence by holding that police officers have no responsibility to exercise independent judgment when obtaining warrants to assure themselves that the warrant is supported by probable cause.

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IN THE

# Supreme Court of the United States

No. 10-704

CURT MESSERSCHMIDT, ET AL.,
*Petitioners,*

*v.*

AUGUSTA MILLENDER, ET AL.,
*Respondents.*

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT**

## BRIEF FOR RESPONDENTS

### STATEMENT

On November 4, 2003, Detective Curt Messerschmidt of the Los Angeles County Sherriff's Department, under the supervision of Sergeant Robert Lawrence, applied for and obtained warrants to arrest Jerry Ray Bowen at 2234 E. 120th Street, Los Angeles, and to search that address and seize property in connection with a "spousal assault ... with a deadly weapon" that Bowen was suspected of committing two weeks earlier. JA 55.

But there were two problems. First, the police had only a tenuous basis to conclude that they would find

Bowen at the 120th Street address. In fact, the police knew, but did not inform the magistrate, that the address was the family home of Augusta Millender. An elderly widow and great-grandmother eleven times over, Mrs. Millender shared her immaculately-kept home with her adult daughter Brenda Millender and grandson William Johnson (collectively, "the Millenders").[1] Augusta Millender had served as Bowen's foster parent fifteen years earlier, but Bowen had not resided with her since then, although Mrs. Millender had allowed Bowen to stay temporarily at the property eight months earlier, when Bowen was in the middle of a marital dispute.

Second, the scope of the search warrant far exceeded any relation to the crime under investigation. Although Bowen was wanted for a domestic assault that the police had no reason to believe was gang-related, the warrant allowed the search and seizure of all "[a]rticles of evidence showing street gang membership or affiliation" and "[a]ny photographs or photograph albums ... which may depict evidence of criminal activity." JA 52. Further, although the police had a specific description and photograph of the weapon that Bowen had used—a "black sawed off shotgun with a pistol grip" (JA 56)—the warrant authorized the search and seizure of "any firearms capable of firing ammunition" (JA 52).

The search of the Millenders' home yielded neither Bowen nor his shotgun; Bowen had not stayed there for

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[1] Augusta Millender passed away on July 17, 2011. An unopposed motion to substitute Brenda Millender as her representative was filed with this Court on October 17, 2011, pursuant to Rule 35.1.

months. Instead, the search terrified an innocent family and damaged their home, and sent Augusta Millender to the hospital. The police also seized Augusta Millender's personal firearm, which she lawfully possessed for self-defense.

1. The incident that precipitated the warrant at issue was a domestic dispute between Bowen and Shelly Kelly, whom Bowen had been dating. When Kelly decided to terminate their relationship, Bowen reacted violently, and fired at Kelly with a "black sawed off shotgun with a pistol grip" as she fled in her vehicle. Kelly alerted police, identified Bowen from a photo line-up, and provided officers with photographs of Bowen. JA 55-57.

According to Messerschmidt's warrant affidavit, Kelly provided Messerschmidt with two possibilities for Bowen's whereabouts: the 120th Street address—where, "if [she were] not mistaken," Bowen might be "hiding out" (Pet. App. 111; JA 205)—or Kelly's residence where the assault took place (JA 58). Messerschmidt's affidavit stated that he had "determined" through a search of "departmental records, state computer records and other police agency records" that Bowen "reside[d]" at the 120th Street address. JA 58.

The records Messerschmidt reviewed, however, were at best ambiguous as to whether Bowen resided with the Millenders. The DMV records showed that as of the month before the assault, Bowen's address was the same as Kelly's. JA 26, 63; *see* Pet. App. 113 ("[Kelly's address] was the most current, not the 120th Street Address"). A restraining order issued against Bowen six months earlier in May 2003, for the protection of Bowen's wife and children, established that Bowen's address was on Marvin Street. ER 584. More-

over, before the search, officers surveilling the Millender house spoke with Augusta Millender and learned from her that Bowen did not live at the house. JA 238.

Because of the violent nature of the crime and Bowen's supposed "ties to the Mona Park Crip gang," Messerschmidt requested night service for the warrant. JA 58-59. But despite an "extensive background search on [Bowen]," the affidavit mentioned no other weapons or crimes, nor whether Bowen had a criminal record.[2] And although Bowen's identity as a gang member was offered to support night service, nothing in the affidavit suggested the assault was gang-related; to the contrary, the altercation was described as a "spousal assault."[3] Nor did the affidavit take account of the fact that the home to be searched belonged to an innocent family.

Messerschmidt also averred his belief that "recovery of *the weapon* could be invaluable in the successful prosecution of the suspect involved in this case, and the curtailment of further crimes being committed." JA 59 (emphasis added). Messerschmidt had good reason to focus on a specific weapon: Kelly had not only described the weapon as a "black sawed off shotgun with a pistol grip" (JA 56), but also had given Messerschmidt a photograph of Bowen posing with the gun. Pet. App. 20; ER 629.

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[2] In fact, Bowen had previous felony convictions and was on summary probation for spousal battery and driving without a license. JA 27-29.

[3] Messerschmidt later testified that he had no basis for believing the assault on Kelly was gang-related. He answered "No" to the question, "So you didn't have any reason to believe that the assault on Kelly was any sort of a gang crime, did you?" ER 877.

Messerschmidt prepared a "Search Warrant and Affidavit" form authorizing the search of the 120th Street address. But although Messerschmidt's affidavit explained that the police sought to arrest Bowen for committing a spousal assault with a specific weapon, the scope of the warrant Messerschmidt drafted was far broader and the warrant failed to identify the crime for which the search was being authorized. Specifically, Messerschmidt sought authorization to search for and to seize

> All handguns, rifles, or shotguns of any caliber, or any firearms capable of firing ammunition, or firearms or devices modified or designed to allow it to fire ammunition. All caliber of ammunition, miscellaneous gun parts, gun cleaning kits, holsters which could hold or have held any caliber handgun being sought. Any receipts or paperwork, showing the purchase, ownership, or possession of the handguns being sought. Any firearm for which there is no proof of ownership. Any firearm capable of firing or chambered to fire any caliber ammunition.

And

> Articles of evidence showing street gang membership or affiliation with any Street Gang to include but not limited to any reference to "Mona Park Crips", including writings or graffiti depicting gang membership, activity or identity. Articles of personal property tending to establish the identi[ty] of person in control of the premise or premises. Any photographs or photograph albums depicting persons, vehicles, weapons or locations, which may appear relevant to gang membership, or which may depict

> the item being sought and or believed to be evidence in the case being investigated on this warrant, or which may depict evidence of criminal activity. Additionally to include any gang indicia that would establish the persons being sought in this warrant, affiliation or membership with the "Mona Park Crips" street gang.

JA 52 (Attachment 2). Along with the search warrant, Messerschmidt prepared an arrest warrant for Bowen (JA 60-62) and completed an affiant statement detailing his experience working in a "specialized unit, investigating gang related crimes and arresting gang members for various violations of the law" (JA 53-54). He showed the warrants and affidavit to his superiors, including Lawrence and a deputy district attorney. Pet. App. 9. On November 4, 2003, a magistrate approved the warrants and the request for night service. *Id.*

2. On November 6, 2003 at 5:00 a.m., approximately thirty officers, including about twenty SWAT officers, arrived at the Millender home to serve the warrants. JA 234; JA 258. The Millenders were asleep. JA 185. The officers forced open the front security door, broke a picture window, and entered the premises with guns pointed. Pet. App. 119; JA 245-249. The Millenders were terrified. Augusta Millender "[h]eard like gun shots going through that glass, coming through my kitchen window ... I said, 'Lord, Whoever this is is going to kill us that night." ER 806. The officers ordered Augusta and Brenda Millender outside in their nightclothes and without shoes (JA 250-252) and handcuffed William Johnson, though he was not under investigation for any crime (JA 192). While the officers looked

for Bowen, Augusta and Brenda Millender stood outside or sat wrapped in blankets in patrol cars. JA 190.[4] Because a deputy refused to allow the 73-year-old Augusta Millender to use the bathroom in her house, she had to urinate in the street. JA 191.

After the house was cleared, the Millenders were allowed to sit in their living room while officers continued the search. JA 256.[5] The officers failed to find either Bowen, his sawed-off shotgun, or any evidence that Bowen lived with the Millenders, except for a single, five-month-old letter from Social Services addressed to Bowen, which he apparently never received. JA 97-98. The officers nevertheless seized Augusta Millender's personal gun—an unloaded 12-gauge "Mossberg" with a wooden stock—and a box of .45 caliber "American Eagle" ammunition. JA 95-96; ER 670-671.

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[4] After the main house was cleared, the SWAT officers moved to the back addition, where Willie Millender, one of Augusta Millender's adult sons, resided. Willie Millender was charged with a misdemeanor for being "under the influence" of a controlled substance (though no such substance was found). He moved to quash the warrant in California Superior Court on the ground that the affidavit did not establish probable cause to believe Bowen would be found at the 120th Street address. The court granted the motion and dismissed the case. *See* JA 193-194; Pet. App. 122-123.

[5] While the Millenders' home was being cleared, Messerschmidt was directing traffic near the property, and he later watched the Millenders as they waited outside. JA 31-32. After the location was secured, Lawrence watched the Millenders as they sat in the living room. JA 257. Messerschmidt "did not use the affidavit at the Millenders' residence to provide more specific direction to the investigators who searched the house ... [n]or did the investigators executing the warrant understand the affidavit to narrow the scope of the search." Pet. App. 18.

Augusta Millender was hospitalized later that day for dangerously high blood pressure. ER 805.[6]

3. The Millenders filed suit under 42 U.S.C. § 1983 against the County of Los Angeles, the Los Angeles County Sheriff's Department, Sheriff Leroy Baca, and 27 Los Angeles County deputies, including petitioners, alleging violations of the Fourth and Fourteenth Amendments as well as state law. The parties filed cross-motions for summary adjudication on, *inter alia*, the validity of the arrest and search warrants.[7] While the court concluded—on a "very close" question—that there was probable cause to believe that Bowen would be found at the 120th Street address (Pet. App. 135), the court invalidated for lack of probable cause all but one sentence of the search warrant's authorization for items to be searched and seized (*see* Pet. App. 152-160).[8] The court ruled that, because the "crime speci-

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[6] Approximately two weeks later, Messerschmidt again contacted Kelly, who told Messerschmidt that Bowen might be found at a local motel. JA 33-34. Messerschmidt went to the motel, knocked on the door, was admitted by Bowen's wife, and arrested Bowen after discovering him hiding under the bed. Pet. App. 122. Bowen was later convicted of assault with a deadly weapon arising out of the incident with Kelly. JA 34.

[7] The parties also filed cross-motions for adjudication on whether the Millenders' detention was reasonable, whether the SWAT officers' entry into the Millender home was unlawful, and whether the SWAT officers were entitled to qualified immunity. The district court determined that qualified immunity was warranted on the issue of the Millenders' detention (Pet. App. 176-177), but that the SWAT officers' entry raised triable issues (Pet. App. 168-169, 171-172).

[8] The sentence held valid authorized the search and seizure of "[a]rticles of personal property tending to establish the identi[ty] of person in control of the premise or premises." JA 52.

fied" was "a physical assault with a very specific weapon" and had no gang connection, there was no probable cause to search for any and all firearms or for a broad class of gang-related items. Pet. App. 157-158. Noting that petitioners "made no additional arguments as to why, even if the warrant was overbroad, [they] acted reasonably," the court denied them qualified immunity. Pet. App. 171.

4. Petitioners appealed the denial of qualified immunity.[9] A divided panel of the court of appeals reversed. Pet. App. 79-105. The court voted to rehear the case en banc and, by an 8-3 vote, with Judge Ikuta writing on its behalf, affirmed the denial of qualified immunity. *See* Pet. App. 1-39.

The court first held that the warrant's authorization to search for all firearms and firearm-related materials was unconstitutionally overbroad. Although stating there was probable cause to search for the "black sawed off shotgun with a pistol grip," the court stressed that Messerchmidt's affidavit "does not set forth any evidence indicating that Bowen owned or used other firearms, that such firearms were contraband or evidence of a crime, or that such firearms were likely to be present at the Millenders' residence." Pet. App. 15-16, 24. The court rejected petitioners' arguments that a broader search was justifiable given Bowen's violent tendencies or the hazard inherent to firearms, noting that "there is no 'dangerousness' excep-

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[9] The Millenders sought to appeal the district court's ruling that there was probable cause to believe that Bowen would be found at the 120th Street address (JA 385-394), but the district court declined to certify that issue for interlocutory appeal, *see* Order, Case No. 05-2298, Dkt. No. 114 (C.D. Cal. May 25, 2007).

tion to the Fourth Amendment's probable cause requirement." Pet. App. 23.[10] The court also rejected Bowen's criminal history as irrelevant because "Messerschmidt did not inform the magistrate of Bowen's prior felonies" (Pet. App. 25), and there is no "per se rule that police have probable cause to search the residences of ex-felons for firearms and firearm-related items" (Pet. App. 23). Because the police lacked "*any* basis, let alone a 'substantial basis,' for probable cause to search and seize the broad category of ... firearm-related materials," the court found the warrant invalid for "this broad range of items." Pet. App. 28 (citation omitted).

The court also held that the warrant's authorization to search for indicia of gang membership lacked probable cause because the affidavit's statements that Bowen had "gang ties" or was a gang member did not suggest "'contraband or evidence of a crime' ... would be found at [the Millenders'] residence." Pet. App. 28-29 (citation omitted). The court noted that neither being a gang member nor having gang ties is a crime in California, and that both the affidavit and the record "failed to establish any link between gang-related materials and a crime." Pet. App. 29.

Second, the court held the deputies were not entitled to qualified immunity because the lack of probable cause was "obvious." Pet. App. 34. "The affidavit indi-

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[10] The court also rejected the argument that the "affidavit narrowed the scope" of the search where "there is absolutely no evidence in this case that the officers who executed the warrant, although instructed to read the affidavit, actually relied on the information in the affidavit to limit the warrant's overbreadth." Pet. App. 18.

cated exactly what item was evidence of a crime, the black sawed-off shotgun with a pistol grip, and reasonable officers would know they could not undertake a general, exploratory search for unrelated items unless they had additional probable cause for those items." Pet. App. 35 (citation omitted).

The court also rejected petitioners' argument that they were entitled to immunity because they "'reasonably relied' on the review and approval of 'their superiors, the district attorney, and the magistrate to correct the alleged over breadth in the search warrant.'" Pet. App. 36-37. Relying on this Court's precedents stressing officers' obligation to exercise independent judgment, as well as numerous Ninth Circuit precedents making clear that probable cause to search for a specific item does not provide probable cause to search for all items of its type, the court determined that the deputies had not exercised reasonable professional judgment. Where "a reasonable officer in the deputies' position would have been well aware" that neither the warrant nor the affidavit "established probable cause" for the broad classes of items sought, petitioners were not entitled to qualified immunity simply because "they obtained a warrant, consulted with their superiors, and acted in good faith." Pet. App. 35-36.

Judges Callahan, Tallman, and Silverman dissented in two separate opinions. Pet. App. 39-76. All the dissenters agreed with the majority that the warrant's authorization to search for gang-related indicia was unconstitutionally overbroad (Pet. App. 45 n.7), and one agreed that the firearms-related provision was overbroad as well (Pet. App. 73) (Silverman, J.). They concluded, however, that the officers were entitled to qualified immunity because "[a]t least" part of the warrant was supported by probable cause, and "absent

some showing of bad faith on the part of the officer or of a failure to present all the relevant known facts to the magistrate ... the officer should be allowed to rely on his superiors, the district attorney and the magistrate to correct any overbreadth." Pet. App. 68-69 (Callahan, J.).

## SUMMARY OF ARGUMENT

As every judge to have considered this case has recognized, the warrant to search the Millender home violated the Fourth Amendment because its scope far exceeded the probable cause supporting it. The only question before this Court is whether petitioners are entitled to immunity for obtaining that warrant, notwithstanding the fact that all twelve judges that have reviewed it have found it to be flawed.

Consistent with Congress's intent expressed in 42 U.S.C. § 1983, this Court has refused to grant immunity to officers who have sought search warrants "so lacking in indicia of probable cause" that reliance on the warrant was objectively unreasonable. *Malley* v. *Briggs*, 475 U.S. 335, 344 (1986). While this Court has recognized that officers must be given latitude to act at the outer perimeter of their authority without fear of reprisal, it has also recognized that the animating principles of § 1983 favor denying immunity in those cases where officers fail to exercise reasonable professional judgment and instead seek warrants that are invalid under clearly established law. That principle was unequivocally established in *Malley* and reaffirmed in *Groh* v. *Ramirez*, 540 U.S. 551 (2004). It is directly applicable here.

Controlling authority from this Court and the court of appeals clearly put petitioners on notice that each

category of items in a warrant must be supported by probable cause, and that probable cause to search for a single specific item does not constitute probable cause to search for every item of that type. Yet here, where petitioners at most had probable cause to search for a specifically-described firearm, petitioners instead sought a warrant to search for any and all firearms. And despite having no belief that the domestic assault at issue had any connection to Bowen's alleged gang ties, petitioners also sought the right to search for any indicia of gang activity, and—even broader still—any photographs "which may depict" *any* criminal activity whatsoever. JA 52. Any reasonable officer would have known that the scope of this request was so disconnected from the crime under investigation as to render the warrant completely lacking in indicia of probable cause. Under this Court's established precedents, petitioners are not entitled to qualified immunity.

Nor should this Court abrogate the obligation of officers to exercise reasonable professional judgment in obtaining warrants. *Stare decisis* favors retaining the important safeguard of requiring officers to reflect before submitting a warrant request to a magistrate. And petitioners have presented no evidence that this rule has proved unworkable or that its foundation has been eroded by subsequent cases. Nor are this Court's recent exclusionary rule cases inconsistent with *Malley*. In any event, § 1983 and the exclusionary rule do not serve identical purposes. As this case starkly illustrates, police officers have few powers more intrusive than the ability to seek and execute search warrants; those who exercise that power without the "reasonable professional judgment" this Court has required, *Malley*, 475 U.S. at 346, should be held accountable.

## ARGUMENT

### I. THIS COURT'S QUALIFIED IMMUNITY PRECEDENTS PRESERVE CONGRESS'S REMEDIAL PURPOSE IN SECTION 1983 BY DENYING IMMUNITY TO POLICE OFFICERS WHO ACT UNREASONABLY IN OBTAINING SEARCH WARRANTS

#### A. Qualified Immunity Doctrine Is Designed To Accommodate Societal Interests While Preserving Congress's Broad Remedial Purpose In Enacting Section 1983

This is not a suppression case. It does not involve an application of the exclusionary rule, a judge-made doctrine that this Court has continually adjusted to reconcile society's compelling interest in the search for truth in the criminal justice system with the need to deter unconstitutional conduct by law enforcement officers. Rather, this is a civil action for damages brought by a family that was innocent of criminal activity, but nonetheless had their house entered into and thoroughly searched and their possessions seized because the police managed to secure an overbroad warrant when looking for a suspect who did not even live there.

The Millenders' cause of action has ancient roots in the common law. It goes back at least to *Wilkes* v. *Wood*, Lofft 1, 98 Eng. Rep. 489 (C.P. 1763), and *Entick* v. *Carrington*, 19 How. St. Tr. 1029 (C.P. 1765), which established that general warrants are invalid, and that officers who conduct searches pursuant to an overbroad warrant may be liable for trespass, even though at common law a valid warrant generally provided a searching officer with immunity from liability. *See* Davies, *Recovering the Original Fourth Amendment*, 98 Mich. L. Rev. 547, 588 (1999) ("Because a general warrant was clearly deemed illegal by the framing era, it

did not protect either the issuing magistrate or the executing officer against trespass liability. Only a legal (that is, specific) warrant indemnified the officer against trespass liability." (footnote omitted)); Alschuler, *Herring v. United States: A Minnow or a Shark?*, 7 Ohio St. J. Crim. L. 463, 501-504 (2009) (noting that historically, a warrant that was invalid gave "no privilege, and without a privilege, [an officer] was strictly liable for his trespass"). That was the public understanding of the law governing search and seizure when the Fourth Amendment was adopted. *See Stanford* v. *Texas*, 379 U.S. 476, 481-485 (1965); *see generally Boyd* v. *United States*, 116 U.S. 616 (1886), *overruled as recognized in Fisher* v. *United States*, 425 U.S. 391, 407 (1976).

Here, the Millenders are proceeding under 42 U.S.C. § 1983, which Congress enacted "to provide a remedy, to be broadly construed, against all forms of official violation of federally protected rights." *Monell* v. *Department of Soc. Servs.*, 436 U.S. 658, 700-701 (1978); *see Carey* v. *Piphus*, 435 U.S. 247, 254-257 (1978) (tracing compensatory purpose of § 1983); *Owen* v. *City of Independence*, 445 U.S. 622, 651 (1980) (§ 1983 reflects the judgment that "[a] damages remedy against the offending party is a vital component of any scheme for vindicating cherished constitutional guarantees"). The Millenders are seeking redress for a violation of the Fourth Amendment, a constitutional wrong for which Congress intended to provide a remedy when it enacted § 1983.

Although § 1983 "creates a species of tort liability that on its face admits of no immunities," *Imbler* v. *Pachtman*, 424 U.S. 409, 417 (1976), this Court has concluded that Congress intended to incorporate certain immunities that were deeply entrenched at common

law. *See Wood* v. *Strickland*, 420 U.S. 308, 317 (1975). The Court has recognized that history and public policy support providing immunity to public officials who have done nothing more than make reasonable mistakes. Construing § 1983 as imposing liability under such circumstances would unfairly penalize officials for merely having failed to accurately predict the outcome of future cases.

But the Court has also recognized that overly expansive immunity would frustrate Congress's intent to ensure a remedy for victims of unconstitutional conduct. *See Wyatt* v. *Cole*, 504 U.S. 158, 167 (1992) ("Qualified immunity strikes a balance between compensating those who have been injured by official conduct and protecting government's ability to perform its traditional functions."); *id.* at 171-172 (Kennedy, J., concurring) ("[W]e are devising limitations to a remedial statute, enacted by the Congress[.]"). "Qualified immunity balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." *Pearson* v. *Callahan*, 555 U.S. 223, 231 (2009).

In *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982), the Court recognized that this balance could best be achieved by having the availability of immunity hinge on "the objective reasonableness of an official's conduct, as measured by reference to clearly established law." Officials will not be penalized for failing "to anticipate subsequent legal developments," but will be liable when "their conduct ... violate[s] clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 818. This test "ensure[s] that before they are subjected to suit, officers

are on notice their conduct is unlawful." *Hope* v. *Pelzer*, 536 U.S. 730, 739 (2002). But it also imposes an expectation that "a reasonably competent public official should know the law governing his conduct." *Harlow*, 457 U.S. at 818-819. "Where an official could be expected to know that certain conduct would violate statutory or constitutional rights, he should be made to hesitate; and a person who suffers injury caused by such conduct may have a cause of action." *Id.* at 819; *see Hope*, 536 U.S. at 740 (immunity unavailable to officials who have "fair warning" that their conduct is unlawful).

### B. This Court Has Maintained The Balance Struck By The Qualified Immunity Doctrine In Cases Involving Search Warrants

This Court has refused to deviate from the fundamental balance struck in the qualified immunity doctrine generally and the objective-reasonableness test in particular in cases involving search warrants. In *Malley* v. *Briggs*, 475 U.S. 335 (1986), this Court was asked to provide absolute immunity to police officers acting pursuant to warrants, or in the alternative, to hold that applying for a warrant is *per se* objectively reasonable provided that the officer believes that the facts alleged in his affidavit are true. This Court refused to do so, and instead preserved the independent obligation of police officers to take reasonable steps to ensure that they are acting lawfully in seeking and executing warrants.

In rejecting the request for absolute immunity, the Court stressed that its role was "to interpret the intent of Congress in enacting § 1983," and that because common law did not provide absolute immunity to one who procured the issuance of a warrant, it could not be pre-

sumed that Congress intended to afford such immunity to officers requesting warrants. 475 U.S. at 339-342. The Court also noted that even if public policy were a permissible consideration, "[i]n the case of the officer applying for a warrant, it is our judgment that the judicial process will on the whole benefit from a rule of qualified rather than absolute immunity." *Id.* at 343. Qualified immunity is preferable because it forces a police officer to engage in "reflection" with respect to "whether he has a reasonable basis for believing that his [warrant] affidavit establishes probable cause." *Id.* The Court concluded that over-deterrence of police officers would not result from such an approach. *Id.*

The Court also noted that it had held in *United States* v. *Leon*, 468 U.S. 897 (1984), that a warrant is not an absolute shield against the exclusionary rule, and found it "incongruous" to treat warrants as providing an absolute bar to damages under § 1983, since the remedy in a § 1983 action (unlike the exclusionary rule) "is benefitting the victim of police misconduct one would think most deserving of a remedy—the person who in fact has done no wrong[.]" 475 U.S. at 344. Thus, *Malley* followed *Leon* in holding that police officers would receive only qualified immunity, and that such immunity would be denied where "the warrant application is so lacking in indicia of probable cause as to render official belief in its existence unreasonable." *Id.* at 344-345.

*Malley* also rejected the argument that requesting a warrant is *per se* objectively reasonable, and that officers are therefore automatically entitled to qualified immunity, so long as the officer does not intentionally mislead the magistrate. 475 U.S. at 345. The Court noted that such an approach would be "at odds with ... *Harlow* and *Leon*" because it would turn on the subjec-

tive state of mind of the affiant rather than any objective ascertainable fact. *Id.* Rather, the test "analogous" to the one outlined in *Harlow* is "whether a reasonably well-trained officer in petitioner's position would have known that his affidavit failed to establish probable cause." *Id.* That test was the right one because even though "in an ideal system an unreasonable request for a warrant would be harmless, because no judge would approve it," (*id.*), "ours is not an ideal system," (*id.*), and a magistrate "working under docket pressures" may erroneously approve unsupported warrants (*id.* at 345-346). It is thus "reasonable to require the officer applying for the warrant to minimize this danger by exercising reasonable professional judgment." *Id.* at 346.

In *Groh* v. *Ramirez*, 540 U.S. 551 (2004), the Court reaffirmed that officers who have sought warrants have an independent "duty to ensure that the warrant conforms to constitutional requirements." *Id.* at 563 n.6. *Groh* involved a damages action against a federal agent who conducted a search after obtaining a warrant that erroneously listed a description of the place to be searched instead of the person or property to be seized. *Id.* at 554. As a result of that omission, the warrant was "plainly invalid" because it did not satisfy the particularity requirement of the Fourth Amendment. *Id.* at 557. The officer nonetheless argued that he was entitled to qualified immunity because the flaw in the warrant was "the product, at worst, of a lack of due care" and thus did not fail the *Malley* standard of objective reasonableness. *Id.* at 563-565. This Court disagreed, concluding that the officer was not entitled to qualified immunity because the warrant was so facially deficient that the officer could not reasonably presume it to be valid. *Id.* *Groh* thus preserves (and perhaps

even extends) *Malley*'s holding that the mere absence of bad faith is not sufficient to guarantee qualified immunity when a warrant is clearly invalid; it remains "incumbent on the officer executing a search warrant to ensure the search is lawfully authorized and lawfully conducted" (*id.* at 563), at least to ensure that the warrant is not invalid under clearly established law.

*Malley* and *Groh* are directly applicable to this case. As explained in Part II *infra*, the court of appeals correctly applied those decisions when it determined that petitioners neglected to fulfill their independent duty to ensure that the search of the Millenders' home was lawful. Petitioners sought a warrant that, under clearly established law, was plainly overbroad. Because a reasonable officer would have known that the warrant was invalid, petitioners are not entitled to qualified immunity.

## II. THE COURT OF APPEALS CORRECTLY APPLIED THIS COURT'S QUALIFIED IMMUNITY PRECEDENTS

Officials are not immune from suit under § 1983 when "a plaintiff pleads facts showing (1) that the official violated a statutory or constitutional right, and (2) that the right was clearly established at the time of the challenged conduct." *Ashcroft* v. *al-Kidd*, 131 S. Ct. 2074, 2080 (2011) (internal quotation marks omitted). As the United States recognizes (Br. 13), the petition for a writ of certiorari presented only a question of immunity, and in particular, whether, in light of clearly established law, a reasonably well-trained officer would have understood that the warrant here was invalid. The court of appeals correctly concluded that a reasonable officer would have known that the warrant to search the Millenders' home was invalid.

### A. It Was Clearly Established At The Time Of The Search That Each Of the Items Identified In A Warrant Must Be Supported By Probable Cause

For a right to be clearly established, "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson* v. *Creighton*, 483 U.S. 635, 640 (1987); *see also Harlow*, 457 U.S. at 818-819. The controlling law in the jurisdiction where the constitutional violation occurred or a "consensus of cases of persuasive authority" provides the touchstone for determining whether a rule was clearly established at the time of the wrongdoing. *Wilson* v. *Layne*, 526 U.S. 603, 617 (1999); *see also Hope*, 536 U.S. at 742-745; *al-Kidd*, 131 S. Ct. at 2086 (Kennedy, J., concurring) (officeholders who work in a single jurisdiction "are expected to adjust their behavior in accordance with local precedent").

The text of the Fourth Amendment, this Court's precedents, and Ninth Circuit authority all clearly established at the relevant time that probable cause is required for each item authorized for search and seizure in a warrant. It was equally clearly established that probable cause for one specifically-identified item does not create probable cause for a generic class of similar items. As the court of appeals recognized, this case involves a routine application of these well-settled principles.

1. The text of the Fourth Amendment makes clear that "no Warrants shall issue, but upon probable cause ... and particularly describing the ... things to be seized," U.S. Const. amend. IV. The Fourth Amendment's requirement that a search warrant be supported

by probable cause is essential to prevent "unauthorized invasions of the sanctity of a man's home and privacies of life." *Berger* v. *New York*, 388 U.S. 41, 58 (1967) (internal quotation marks omitted); *see also Payton* v. *New York*, 445 U.S. 573, 585 (1980). Moreover, "[b]y limiting the authorization to search to the specific areas and things *for which there is probable cause to search*," the Warrant Clause ensures that "the search will be carefully tailored to its justifications, and will not take on the character of the wide-ranging exploratory searches the Framers intended to prohibit." *Maryland* v. *Garrison*, 480 U.S. 79, 84 (1987) (emphasis added); *see Go-Bart Importing Co.* v. *United States*, 282 U.S. 344, 357 (1931) (Fourth Amendment "prevents the issue of warrants on loose, vague or doubtful bases of fact" and thus prohibits a "general exploratory search in the hope that evidence of crime might be found"). Were this not so, the Fourth Amendment would do nothing to "make[] general searches ... impossible." *Stanford*, 379 U.S. at 485; *see also Massachusetts* v. *Sheppard*, 468 U.S. 981, 988 n.5 (1984) ("The uniformly applied rule is that a search conducted pursuant to a warrant that fails to conform to the particularity requirement of the Fourth Amendment is unconstitutional.").

Thus, courts have uniformly held that, to prevent a "general, exploratory rummaging in a person's belongings," *Andresen* v. *Maryland*, 427 U.S. 463, 480 (1976), the scope of the warrant must be limited to the extent of the probable cause. *See In re Grand Jury Subpoenas Dated Dec. 10, 1987*, 926 F.2d 847, 856-857 (9th Cir. 1991) (citing cases). And if evidence of a crime is sought, the warrant must contain guidelines to aid the officers in deciding what may or may not be seized. *See United States* v. *Washington*, 707 F.2d 1461, 1472 (9th

Cir. 1986). As a leading treatise has summarized, even "an otherwise unobjectionable description of the objects to be seized is defective if it is broader than can be justified by the probable cause upon which the warrant is based." 2 LaFave, *Search & Seizure* § 4.6(a), at 607 (4th ed. 2004).[11]

Although petitioners and *amici* acknowledge the "general rule that the full breadth of the warrant must be supported by probable cause" (U.S. Br. 30), they contend that this principle is too general to provide the necessary guidance to overcome qualified immunity. In particular, the United States argues that because no precedent involved the specific facts at issue here—an unlawful search of an innocent family's home for all firearms and gang-related items that might belong to the perpetrator of a spousal assault who did not live with that family—there was no clearly established law that alerted the officers to the unreasonableness of their actions. But this Court has never allowed imma-

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[11] Petitioners rely (Br. 56) on *Ortiz* v. *Van Auken*, 887 F.2d 1366 (9th Cir. 1989), but *Ortiz* did not involve an overbroad warrant. Rather, the issue in *Ortiz* was whether the officer could reasonably conclude that the particular facts from an anonymous informant put before the magistrate were sufficiently reliable to establish probable cause. As *Ortiz* explained, cases involving an overbroad warrant are distinguishable because they "provide[] officers no guidance as to the boundaries of the search which they must execute." *Id.* at 1370. Moreover, contrary to petitioners' assertions, the Ninth Circuit has attributed a warrant's overbreadth to a lack of probable cause. *See United States* v. *Kow*, 58 F.3d 423, 427 (9th Cir. 1995) ("affidavit did not establish the probable cause required to justify the widespread seizure ... authorized by the warrant"); *United States* v. *Stubbs*, 873 F.2d 210, 211 (9th Cir. 1989) ("no[] probable cause to seize all documents in Stubbs's office").

terial factual distinctions to inform the standard for determining when clearly established law exists. *See Anderson*, 483 U.S. at 640 (explaining that "the very action in question" need not "previously [have] been held unlawful"); *United States* v. *Lanier*, 520 U.S. 259, 271 (1997) ("[A] general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though the very action in question has [not] previously been held unlawful." (internal quotation marks omitted)). As the Court recently explained, "[w]e do not require a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate." *al-Kidd*, 131 S. Ct. at 2083.

2. The Ninth Circuit has also repeatedly invalidated warrants authorizing a search for a general class of items when probable cause existed only for specific items within that class. *See, e.g.*, *United States* v. *Kow*, 58 F.3d 423, 427 (9th Cir. 1995) ("affidavit did not establish the probable cause required to justify the widespread seizure of documents authorized by the warrant"); *United States* v. *Spilotro*, 800 F.2d 959, 965 (9th Cir. 1986) (Kennedy, J.) (where accompanying affidavit "mentioned only a few stolen diamonds" warrant's "authorization to seize 'gemstones and other items of jewelry' ... [bore] no relation to whatever probable cause the government had"); *VonderAhe* v. *Howland*, 508 F.2d 364, 369 (9th Cir. 1974) (invalidating warrant where "there may have been 'probable cause' to search for and seize the yellow sheets and green cards for 1966 and 1967, [but] there was no probable cause shown for a seizure of all the doctor's dental books and records, or

his personal and private papers").[12] This requirement has particular force where, as here, the warrant provided for the "unrestricted seizure of items ... without describing the specific crimes suspected," *United States* v. *Bridges*, 344 F.3d 1010, 1018 (9th Cir. 2003), and there were no guidelines to distinguish items used lawfully from those the government had probable cause to seize, *see United States* v. *Stubbs*, 873 F.2d 210, 211 (9th Cir. 1989).[13]

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[12] Although Ninth Circuit precedent is most relevant here for purposes of determining the contours of "clearly established" rights, other circuits also have invalidated warrants that purport to authorize a search for a general class of items when probable cause existed only for specific items within that class. *See, e.g.*, *United States* v. *Roche*, 614 F.2d 6, 8 (1st Cir. 1980); *United States* v. *Cook*, 657 F.2d 730, 733-734 (5th Cir. 1981); *In re Grand Jury Proceedings*, 716 F.2d 493, 498-499 (8th Cir. 1983); *United States* v. *Leary*, 846 F.2d 592, 602, 604-605 (10th Cir. 1988); *see also United States* v. *George*, 975 F.2d 72, 75-76 (2d Cir. 1992).

[13] The Ninth Circuit has recognized that the Fourth Amendment does not preclude all use of generic language, because "[i]n many cases officers are unable to specify in advance all seizable evidence on the premises to be searched." *United States* v. *Hillyard*, 677 F.2d 1336, 1339-1340 (9th Cir. 1982) (Kennedy, J.). But it has also stressed that, when such generic language is used, there must also be "objective, articulated standards for the executing officers to distinguish between property legally possessed and that which is not." *Id.* at 1340. That requirement was not met in this case, for the warrant provided no way to identify those firearms (or other items) properly subject to seizure from among the generic class. And the Ninth Circuit has also made clear that "generic classifications in a warrant are acceptable only when a more precise description is not possible." *Kow*, 58 F.3d at 427 (internal quotation marks omitted). Here, of course, the officers knew exactly how to describe the weapon used in the spousal assault; they even had a photograph of Bowen posing with that weapon.

Based on this extensive case law, the "contours of the right"—that probable cause to search for and seize one specific item does not establish probable cause to search for and to seize all similar items of a generic class—were sufficiently clear for a reasonable officer to understand and follow. *See* 2 LaFave § 3.7(d), at 435-436 (summarizing the principle that "probable cause to search for [] two items [of stolen property] ... does not establish the suspect's ongoing activities as a fence so as to justify issuance of a warrant authorizing search for other stolen property as well"). That the relevant precedent involved different generic classes of items from the ones sought in this case—documents, stolen jewelry, and stolen cars as opposed to firearms—is irrelevant.

Finally, petitioners and *amici* argue that the contours of the law are unclear because the three judges who dissented from the en banc court's decision believed that the law enforcement officers acted reasonably in relying on the search warrant, even if some provisions of the warrant were overbroad. But every single judge of the court of appeals acknowledged that the warrant was flawed. Nor did the judges disagree about the legal principles applicable to the warrant. The primary disagreement that divided the en banc court concerned qualified immunity law, not Fourth Amendment law. And in any event, in determining whether the contours of a right are "clearly established," this Court has required only that existing precedent have settled the question—not that there be unanimity among judges as to the application of that precedent. *Compare Groh*, 540 U.S. at 565 (denying officer qualified immunity), *with id.* at 576 (Thomas, J., dissenting) (arguing that no Fourth Amendment violation had occurred).

### B. No Reasonable Officer Would Have Believed That There Was Probable Cause To Search The Millender Home For The Broad Classes Of Items Sought In The Warrant

In light of this clearly established law, no reasonable officer could have concluded that the search of the Millender home was lawful. "[T]he warrant application [was] so lacking in indicia of probable cause as to render official belief in its existence unreasonable." *Malley*, 475 U.S. at 344-345. Petitioners failed to provide *any* facts or circumstances from which a magistrate could properly conclude that there was probable cause to seize the broad classes of items being sought, beyond the specific firearm that Kelly had identified (and was displayed in a photograph of Bowen she provided the police). Here, the warrant "authorize[d] wholesale seizures of entire categories of items not generally evidence of criminal activity, and provide[d] no guidelines to distinguish items used lawfully from those the government had probable cause to seize." *Spilotro*, 800 F.2d at 964. No reasonable officer could have presumed that such a warrant was valid.

#### 1. Gang-related items and "photographs ... of criminal activity"

With respect to the warrant's authorization to search for and seize all gang-related items and photographs "which may depict ... criminal activity," it is all but conceded that the warrant was unconstitutionally overbroad. Petitioners, however, maintain that these provisions were not "so lacking in indicia of probable cause" to make reliance on the warrant objectively unreasonable. That argument is meritless.

Messerschmidt's affidavit provided only that Bowen was "a known Mona Park Crip gang member"

based on "information provided by the victim and the cal-gang data base." JA 58-59. Gang paraphernalia may, of course, show membership in a gang, but gang membership, without more, is not a crime in California, *see People* v. *Gardeley*, 927 P.2d 713, 725 (Cal. 1996). And searches and seizures for indicia of association, without any basis for establishing that that association has anything to do with the particular crime under investigation, lack probable cause. *See United States* v. *Rubio*, 727 F.2d 786, 793-794 (9th Cir. 1983) (affidavit in support of search warrant authorizing seizure of indicia of membership or association with Hell's Angels "insufficient to provide the requisite nexus between the association of the defendants with ... criminal activity").

Here, no reasonable officer could have believed that the affidavit presented to the magistrate contained a sufficient basis to conclude that the gang paraphernalia sought was contraband or evidence of a crime. Indeed, Messerschmidt, who prepared the affidavit, testified that he knew at the time he drafted the affidavit that the assault he described was not gang-related. ER 877; *see also supra* note 3. Nor could the magistrate have reasonably concluded, based on the affidavit, that Bowen's gang membership had anything to do with the crime under investigation. The affidavit described a "spousal assault" that ensued after Kelly decided to end her "on going dating relationship" with Bowen. JA 55. Nothing in that description suggests that the crime was gang-related or that the gang paraphernalia described in the warrant was contraband or evidence of the crime.

Petitioners' attempt (Br. 43) to imagine a reasonable nexus between the crime and gang-related activity based on Messerschmidt's previous experience in the "manners in which gang-related assaults are commit-

ted, the motives for such assaults, and the concealment of weapon(s) used in such assaults" (JA 53-54) is unavailing. An affiant's "boilerplate recitations" do not contribute to probable cause where they were "not drafted with the facts of this case or this particular defendant in mind." *United States* v. *Weber*, 923 F.2d 1338, 1345 (9th Cir. 1990). Messerschmidt's statement merely recites his general experience and "training pertaining to gang related crimes." JA 53-54. It draws no correlations between gang membership and domestic violence, nor does it offer any details regarding Messerschmidt's experience with the manners, motives, or instrumentalities of non-gang-related assaults.

The United States contends (Br. 20) that petitioners could reasonably have believed that there was probable cause to search for gang-related items "at least as part of a search for identity information." Petitioners, however, never made that argument in the courts below, demonstrating that it is, at best, a *post hoc* rationalization for the warrant. And in any event, the identity of Bowen "in the event of his arrest" (U.S. Br. 20) was never in question. Kelly and another witness had identified him, and petitioners had his photograph. *See* JA 61, 91, 94. Nor could gang-related paraphernalia have established that *other* items at the house belonged to Bowen, particularly where petitioners also assert (Br. 4-5; JA 26, 28) that they were aware at the time the warrant was sought that unnamed persons "associated" with the Millender home were also Mona Park Crip members. If that is so, then Mona Park Crip indicia could not even plausibly serve to identify *Bowen* or to establish *Bowen's* control of the premises.

Moreover, the warrant sought not just indicia related to the Mona Park Crips, but "[a]rticles of evi-

dence showing street gang membership or affiliation with *any Street Gang*," as well as "any photographs or photograph albums depicting persons, vehicles, weapons or locations, which may appear relevant to gang membership ... *or which may depict evidence of criminal activity*." JA 52 (emphasis added). This provision reaches far beyond anything that might reasonably be considered contraband or evidence of a crime. Indeed, its authorization, which reaches "writings," nondescript "items of evidence," and "photographs ... of criminal activity," could comprise virtually anything, and thus impermissibly leaves "[every]thing ... to the discretion of the officer executing the warrant." *Stanford*, 379 U.S. at 485 (internal quotation marks omitted); *see also* 2 LaFave, § 4.6 ("[t]here is no end to the objects which may constitute ... evidence of criminal activity"). Warrants that authorize searches for "evidence of criminal activity" have long been held constitutionally inadequate. *See United States* v. *George*, 975 F.2d 72, 75-76 (2d Cir. 1995) (warrant authorizing search for "evidence relating to the commission of a crime" "offends the Fourth Amendment"); *Spilotro*, 800 F.2d at 965 ("evidence of a violation of any one of thirteen statutes" inadequate). The warrant thus has a "glaring deficiency" no reasonable officer could overlook. *Groh*, 540 U.S. at 564.[14]

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[14] Nor could it be said that the language of the warrant could be "construed in light of an illustrative list of seizable items." *United States* v. *Riley*, 906 F.2d 841, 844 (2d Cir. 1990). Here the only seizable items described were broad classes of firearm- and gang-related indicia, and the warrant itself did not identify the crime under investigation. *Cf. Andresen*, 427 U.S. at 481-482.

### 2. Firearms and firearm-related materials

Petitioners claim that a reasonably well-trained officer would not have known that the search warrant failed to establish probable cause to search for and seize "any firearms" or firearms-related materials in the Millender home. But not a single fact presented to the magistrate even arguably supports probable cause for, among other items, "any firearms capable of firing ammunition." JA 52. A reasonable officer would have recognized not only that the warrant lacked probable cause to seize such broad classes of items, making it unconstitutionally overbroad, but also that it was so completely devoid of probable cause as to make reliance on the warrant objectively unreasonable.[15]

An officer seeking a warrant must provide in the affidavit adequate supporting facts about the underlying circumstances to show that probable cause supports the particular search requested. Probable cause to

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[15] Notably, petitioners have abandoned *all* of the arguments that they raised in the court of appeals with respect to whether their reliance on the warrant was objectively reasonable. They no longer contend that the warrant's authorization to search for "any firearms" was reasonable because "Kelly could have been mistaken in her description of the gun"—an assertion the court of appeals rejected as having "little force" where Kelly in fact "provided the officers with a picture of the weapon." Pet. App. 20-21; *see Spilotro*, 800 F.2d at 963 (reasonable to draft the description broadly only where a more precise description of the items to be seized was not available). Nor do petitioners assert that Messerschmidt's affidavit narrowed the scope of the warrant such that "executing officers [could] differentiate items subject to seizure from those which are not." *Id.* As the court of appeals determined, "there is no evidence in the record" that the officers relied on the affidavit to cure the warrant's overbreadth. Pet. App. 18; *see also Kow*, 58 F.3d at 429 n.3.

search "exist[s] where the known facts and circumstances are sufficient to [convince] a man of reasonable prudence in the belief that contraband or evidence of a crime will be found" in a particular place. *Ornelas* v. *United States*, 517 U.S. 690, 696 (1996); *see United States* v. *Johnson*, 256 F.3d 895, 906 (9th Cir. 2001) (en banc) (police "obtain probable cause because the facts indicate that they will find what they are looking for in the place to be searched").

Here, neither the warrant nor the affidavit provided any substantiation that the broad categories of firearms or firearm-related material described in the warrant were "contraband or evidence of a crime." To the contrary, the affidavit indicated exactly what item was evidence of a crime—the "black sawed off shotgun with a pistol grip." JA 56. No facts established that Bowen possessed any other firearms, let alone that such firearms (if they existed) were "contraband or evidence of a crime," or were likely to be found at the Millenders' residence. Indeed, in this respect, the warrant was also plainly deficient as it contained no way at all for the executing officers to distinguish between firearms legally possessed and those being sought by the warrant. *See supra* note 13. Accordingly, a reasonably well-trained officer would have readily perceived that there was no probable cause to search the house for *all* firearms and firearm-related items.

The affidavit sworn by Messerschmidt supports no other conclusion. It simply stated that (1) two weeks earlier, Bowen, a known gang member, (2) had assaulted Kelly, with whom he was in "an ongoing dating relationship," and (3) fired a "black sawed-off shotgun with a pistol grip" in her direction as she fled. JA 55-57. But evidence that Bowen assaulted Kelly with a particularly-described weapon in a domestic dispute

does not support probable cause to believe that other firearms that might be found at the Millenders' house would also be contraband or evidence of a crime.

First, firearms are not contraband; owning them is "usually licit and blameless conduct," *Staples* v. *United States*, 511 U.S. 600, 613-614 (1994), and, in a residence, may be protected by the Second Amendment, *District of Columbia* v. *Heller*, 554 U.S. 570, 592 (2008). Second, even if the sawed-off shotgun Bowen used to commit the assault was also evidence of possession of an illegal or unregistered gun, that fact would still merely provide probable cause to seize *that* weapon. It would not provide a factual basis to suspect that Bowen possessed other firearms, let alone that those firearms could be found at the Millenders' home.[16] *See VonderAhe*, 508 F.2d at 370 ("Were this the law, the Commissioner, upon finding any suspicious deficiency, could order a seizure of every such taxpayer's records upon the mere allegation that the omission or an inaccurate statement of one item might bespeak inaccuracies as to others which, in his opinion, necessitates a seizure of all records, at office and home."). Indeed, as the United States acknowledges (Br. 27), it is "obvious" that the warrant in this case could not have authorized a search for stolen vehicles or drugs. But there is no principled difference between a warrant that would authorize a search for drugs or stolen vehicles and the warrant

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[16] Even if, as petitioners argue (Br. 41), "[m]any people who own guns own more than one," the issue is not whether there was a "fair probability" that Bowen had other guns, but whether there was a fair probability that such guns were "contraband or evidence of a crime" that were likely to be found at the Millender residence (*see Illinois* v. *Gates*, 462 U.S. 213, 238 (1983)). The affidavit provided no evidence to support such a conclusion.

here. Both have an "obvious" gap between "the facts alleged in the affidavit and the scope of the warrant" so as to "place the ... question beyond debate." U.S. Br. 27 (internal quotation marks omitted).

Petitioners' emphasis (Br. 42-43) on the "close nexus" between guns and serious criminal activity, including drug trafficking, does not help their cause. Nothing in Messerschmidt's affidavit linked Bowen to drug trafficking or any other ongoing criminal enterprise. The crime under investigation was a "spousal assault." It was neither plausibly related to Bowen's gang membership nor remotely in furtherance of some broader criminal conspiracy. These facts readily distinguish this case from the decisions on which petitioners rely; in those cases, the police were investigating ongoing criminal activity such as drug trafficking, to which the possession and use of weapons were integral. *See* Pet. Br. 42-43 (citing cases). None of these decisions suggests that an isolated non-gang-related crime by a gang member establishes, or reasonably could have been thought to establish, probable cause to search for and to seize any firearms. To arrive anywhere close to petitioners' contrary position requires stacking inference upon inference until the conclusion is too weak to support an objectively reasonable belief that the relevant provision was supported by probable cause. *Weber*, 923 F.2d at 1344 ("[W]ith each succeeding inference, the last reached is less and less likely to be true.").

Petitioners' and *amici*'s remaining arguments are meritless. In particular, although officers executing a warrant may surely secure firearms they find to ensure safety while the operation is being carried out, that does not provide probable cause for a warrant to search for and to seize all firearms during a search. Such a

rule would effectively place firearms outside the protection of the Fourth Amendment as a categorical matter, by allowing the police always to seize (not just temporarily secure) any firearms during a search, and also allowing the police to rummage through every house they search to find such firearms. As the court of appeals explained, if "a warrant's overbreadth could be cured simply because of potential danger to police officers at some point in the future," officers could "transform every warrant into a 'general, exploratory search[.]'" Pet. App. 23.

### C. This Court Should Reject Petitioners' Attempt To Alter The Objective Reasonableness Inquiry

This Court has made clear that, when a law enforcement officer violates the Fourth Amendment, that officer may be held liable for his objectively unreasonable conduct. Petitioners attempt to alter the objective reasonableness inquiry by relying on facts never presented to the magistrate and recharacterizing the warrant they sought. Those arguments should be rejected.

#### 1. Information omitted from the warrant application does not entitle petitioners to qualified immunity

Petitioners argue (Br. 62-63) that, although they did not present the fact of Bowen's felon status to the magistrate, their personal knowledge of Bowen's criminal history should be credited in the analysis of whether the warrant was "so lacking in indicia of probable cause" that no reasonable officer would have relied on it. It is unclear what this additional information about Bowen's criminal history would have added to the calculus, because the mere fact that Bowen was a

felon could not provide probable cause to conclude that broad classes of firearms potentially belonging to Bowen might be found at the Millenders' house. Bowen could, to be sure, be charged with unlawful possession of a firearm by a felon, and on that basis the police might have had probable cause to search for the specific firearm he was known to possess. Still, the police had no reason to believe that Bowen possessed any other firearms, and his felon status did not give them probable cause to search the Millenders' home for "[a]ll handguns, rifles, or shotguns of any caliber, or any firearms capable of firing ammunition" (JA 52).[17]

More fundamentally, petitioners' argument runs counter to this Court's precedent and the Ninth Circuit rule that reviewing courts may not credit information arguably supporting probable cause known to the officer but withheld from the magistrate.[18] Whether a

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[17] Petitioners (Br. 45) and the United States (Br. 30 n.6) note three decisions from other circuits—two of them unpublished—holding that under certain circumstances it may be appropriate to search a felon's home for all firearms. But none of those cases approved of such a broad search of a home that the police knew (but did not tell the magistrate) belonged to a wholly innocent third party with numerous law-abiding residents. The United States cites two other cases that involved similarly worded warrants, *United States* v. *Guzman*, 507 F.3d 681 (8th Cir. 2007), and *Muehler* v. *Mena*, 544 U.S. 93 (2005), but neither addressed whether a suspect's felon status justifies a search for all firearms.

[18] The information actually provided to the magistrate plainly did not establish probable cause to conclude, or to reasonably infer from the totality of that information, that Bowen was a convicted felon. Although the affidavit established that Kelly broke off her relationship to Bowen because of Bowen's "violent temper," and that Bowen, a gang member, fired a weapon at her, no facts in the affidavit suggested that Bowen even had a criminal record, let alone that his felon status rendered illegal his possession of *any*

search warrant is valid depends on whether "*the magistrate* had a substantial basis for concluding that probable cause existed." *Illinois* v. *Gates*, 462 U.S. 213, 238-239 (1983) (emphasis added). An officer may rely in objective good faith on the warrant only when he has a reasonable belief that the magistrate had a substantial basis for finding probable cause. The reasonableness of the magistrate's probable cause determination is solely a function of the information presented to the magistrate; indeed, "[a] contrary rule would, of course, render the warrant requirements of the Fourth Amendment meaningless." *Whiteley* v. *Warden*, 401 U.S. 560, 565 n.8 (1971).

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firearm. To the contrary, although the affidavit stated that Messerschmidt undertook an "extensive background search [on Bowen]," it provided no criminal history whatsoever. A reasonable magistrate would surely have expected the affidavit to recite Bowen's criminal history, if there was one. The "practical, commonsense" reading of the affidavit, *Gates*, 462 U.S. at 238, is precisely contrary to the one that petitioners and amici now propose.

Moreover, as any reasonably well-trained officer would be aware, a magistrate could not have reasonably inferred that information about Bowen's membership in a gang as established in "the cal-gang data base" could support that Bowen had prior felony convictions. "[A] name may be added to the database based on nothing more than information that a '[s]ubject has been seen frequenting gang areas' or 'has been seen affiliating with documented gang members.'" Pet. App. 25. The Advisory Committee for the CALGANG database therefore warns that it "is not designed to provide users with information upon which official actions may be taken," and "*cannot be used to provide probable cause* for an arrest or be documented in an affidavit for a search warrant." Cal. Gang Node Advisory Comm., Policy and Procedures for the CALGANG® System 7 (Sept. 27, 2007), *available at* http://ag.ca.gov/calgang/pdfs/policy_procedure.pdf (emphasis added).

Information not presented to the magistrate cannot be relevant to the question of "whether a reasonably well trained officer would have known that the search was illegal despite the magistrate's authorization." *Leon*, 468 U.S. at 922 n.23. As the Ninth Circuit has explained:

> The *Leon* test for good faith reliance is clearly an objective one and it is based solely on facts presented to the magistrate. An obviously deficient affidavit cannot be cured by an officer's later testimony on his subjective intentions or knowledge.

*United States* v. *Hove*, 848 F.2d 137, 140 (9th Cir. 1988) (citation omitted); *see also United States* v. *Luong*, 470 F.3d 898, 902 (9th Cir. 2006).

Petitioners' reliance (Br. 62) on *United States* v. *Martin*, 297 F.3d 1308 (11th Cir. 2002), to argue that information beyond the four corners of the warrant may be considered in determining whether an officer would have known a search was illegal despite a magistrate's authorization, is misplaced. The *Martin* court itself distinguished *Hove*, making clear that, where an affidavit lacks any indicia of probable cause, "an officer's later testimony of his intentions or knowledge ... could not be taken into account in the face of such a deficient warrant." *Id.* at 1319 n.11. Only where there *are sufficient indicia* of probable cause to make an officer's reliance on the warrant "not entirely unreasonable" may a court "look beyond the four corners of the affidavit to determine whether the *Leon* good faith exception applies." *Id.* In other words, when an officer reaches a mistaken but reasonable judgment that specific facts presented to the magistrate establish probable cause to search for specific items, it may be that

courts can look outside the affidavit to determine if the officer's overall conduct was "reasonable."[19] But it does not follow that, when an officer provides *no* facts to the magistrate that support probable cause to search for and seize broad classes of items, the officer can later excuse his failure based on what he might hypothetically have told the magistrate.

And this Court should not now adopt such a rule. "To permit the total deficiency of the warrant and affidavit to be remedied by subsequent testimony concerning the subjective knowledge of the officer who sought the warrant would ... unduly erode the protections of the fourth amendment." *Hove*, 848 F.2d at 140. Petitioners argue (Br. 62) that "Messerschmidt had every incentive to disclose to the magistrate all of the facts he knew supporting probable cause, including that Bowen was a convicted felon." But that is hardly a self-evident proposition; if officers know that they can rely, *post hoc*, on information that they knew but did not provide the magistrate to save a patently overbroad warrant, they are likely to become careless in ensuring that they give the magistrate all the information relevant to the probable cause determination. Such a *post hoc* rule also

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[19] Similarly, in the cases cited by the United States (Br. 23), the circuit courts considered information known to the officers but withheld from the judge because the warrant or affidavit contained some indicia of probable cause to support a search. *See United States* v. *Clay*, 646 F.3d 1124, 1126-1128 (8th Cir. 2011) (suggesting some indicia of probable cause existed to support the search, even though the warrant failed to establish a confidential informant's reliability); *United States* v. *Bynum*, 293 F.3d 192, 199 (4th Cir. 2002) ("Wholly apart from the information known to [the agent] but not included in his affidavit, th[e] affidavit contained sufficient indicia of probable cause so as not to render reliance on it totally unreasonable.").

invites mischief, for it may encourage officers, once the warrant is challenged, to claim that information not given to the magistrate was known to them before the warrant was issued, even if that is not true.

Moreover, examination of an officer's subjective knowledge or state of mind is the kind of inquiry that this Court rejected when it settled on objective reasonableness as the lodestar for both the good-faith exception to the exclusionary rule and qualified immunity. *See Harlow*, 457 U.S. at 815. As this Court affirmed in *Leon*, "[w]e adhere to the view" that "'[i]f subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate.'" 468 U.S. at 915 n.13. "[T]he question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." *Graham* v. *Connor*, 490 U.S. 386, 397 (1989). Thus, the relevant question is whether the officer reasonably believed that the warrant was properly issued, not whether, in retrospect, the officer could have established that there was probable cause.[20]

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[20] Petitioners' argument raises additional complications because Messerschmidt was aware of several facts that were omitted from the warrant application that *undermined* his assertion that probable cause supported the search. These include the fact that Kelly told Messerschmidt only that Bowen might be "hiding out" at his former foster mother's house (Pet. App. 111-112), a fact that would have cast doubt not only on the likelihood that Bowen would be at the Millenders' (who were not suspected of any crime), but also on whether Bowen would have stashed at the Millenders' the broad classes of items the warrant sought to seize. Similarly, it remains unclear why petitioners did not include information in the warrant or affidavit that the Millender home was a place where Bowen had been raised as a foster child fifteen years earlier and

Petitioners' remaining arguments to the contrary are meritless. In particular, petitioners are incorrect (Br. 47) that omitting Bowen's felon status from the warrant was a "reasonable 'mistake of fact' to which qualified immunity applies." First, where an omission renders a warrant "so lacking indicia of probable cause," that omission is decidedly unreasonable. *Malley*, 475 U.S. at 345; *cf. Groh*, 540 U.S. at 565 (a "facially deficient" warrant "cannot reasonably [be] presume[d] ... valid'"). In any event, the record in this case does not support that any such mistake of fact occurred. Messerschmidt testified that he did not inadvertently omit any fact from his affidavit.[21] To the contrary, just as in *Malley*, the affidavit relied upon by the magistrate was precisely what petitioners intended to submit. *See* 475 U.S. at 337-339.

Petitioners' reliance on information not provided to the magistrate is also fundamentally in tension with their argument that an officer acts in good faith by relying on a neutral magistrate's judgment that probable cause supports a search for the items listed in a warrant. Petitioners are trying to claim the advantages of having sought a warrant, while simultaneously claiming that they are entitled to the benefit of material they withheld from the magistrate. Petitioners should not

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had stayed only temporarily since then, undermining Messerschmidt's assertion that it was Bowen's residence.

[21] *See* ER 850-851 (Q: Anything you would change [in your warrant affidavit]? A: No. Q: Anything you would add to it? A: No. Q: Do you think anything important was left out of it? A: No.); ER 883 (Q: Is it still true [that you wouldn't make any changes to your affidavit] now that you've had an opportunity to reevaluate and look more closely at the case? A: *I wouldn't change anything.* (emphasis added)).

be able to justify their conduct by reference to the "greater incompetence of the magistrate," *Malley*, 475 U.S. at 346, n.9, while also arguing that the magistrate need not be privy to all of the relevant facts. Moreover, petitioners are particularly ill-situated to claim reliance on the magistrate's mistake, because Messerschmidt prepared the invalid warrant and submitted it to the magistrate for approval. He may not now argue that he "reasonably relied on the [m]agistrate's assurance that the warrant contained an adequate description of the things to be seized and was therefore valid." *Groh*, 540 U.S. at 564.

A magistrate who does not have all the information known to the officer cannot make reliable probable cause determinations. That deficiency fatally undermines the Fourth Amendment's warrant requirement. After all, the point central to the Fourth Amendment is not *why* information is not presented to a magistrate, but that the omission of information can prevent "probable cause, supported by Oath or affirmation," from being presented to a neutral magistrate as the Constitution requires. U.S. Const. amend. IV; *see Gates*, 462 U.S. at 239 (problem with inadequate affidavits is that they "give[] the magistrate virtually no basis at all for making a judgment regarding probable cause").

### 2. It is both irrelevant and untrue that petitioners could have obtained a warrant supported by probable cause that authorized a search of identical scope

Petitioners argue (Br. 63-65) that even if all their other arguments were to fail, they are nevertheless entitled to qualified immunity because they *could* have sought a warrant to search the Millender home limited to the item for which probable cause did exist—the

sawed-off shotgun—and the scope of *that* search would have been as broad as the search that was executed. Not only have petitioners failed to cite any decision by *any* court that would support such an argument, but they are wrong on the facts as well.

*First*, the language they recite from the dissenting opinions in *Groh* is taken completely out of context. In particular, they mischaracterize Justice Kennedy's dissent, which focused on the fact that a "clerical error" in the warrant inflicted no actual harm on plaintiffs because the search was conducted as if the warrant had been accurate. *See Groh*, 540 U.S. at 570-571 (Kennedy, J., dissenting). Those circumstances are a far cry from the situation here, where a *substantive* defect in the warrant—it lacked probable cause—authorized a highly intrusive search of the Millenders' home and the seizure of Mrs. Millender's personal, lawful firearm and ammunition. Indeed, *Groh* expressly rejected that a constitutionally defective warrant may be cured by the fact that the defect did not expand the actual scope of the search. *See* 540 U.S. at 560. Petitioners also mischaracterize the holding of *Massachusetts* v. *Sheppard*, 468 U.S. 981, 987 (1984). Contrary to petitioners' assertion (Br. 64), nowhere did the Court in *Sheppard* even consider whether the officers might have acted reasonably based on the argument that the scope of the search was not expanded.

*Second*, the premise of petitioners' argument is incorrect—the scope of the search *was* expanded. In particular, the warrant's authorization to search for all gang-related items and all photographic indicia of criminal activity allowed the officers to rifle through the Millender family's photo albums and to turn out the contents of dresser drawers, looking for articles of clothing and other items that could not possibly have

been evidence of the crime under investigation or have established Bowen's identity or control of the premises. And the warrant expanded the scope of the seizure: Mrs. Millender's personal firearm and ammunition were seized by the officers, notwithstanding the warrant's complete lack of probable cause to do so. The warrant executed by the officers was thus much more invasive than one that petitioners *could* have sought—but did not.

## III. Petitioners Have Given This Court No Reason To Overrule Its Precedents

As they are unable to prevail under this Court's precedents, petitioners and their *amici* have asked the Court to overturn those decisions. Petitioners call for *Malley* to be overruled and for officers to be freed from any independent obligation to ensure that warrants are supported by probable cause. The State of Texas goes even further, asking the Court to overrule not just *Malley* but much of this Court's Warrant Clause jurisprudence.[22] The United States refrains from explicitly calling for any precedents to be overturned, but it asks the Court to take such a cramped reading of *Malley* as to render it a nullity. The Court should reject these calls.

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[22] The Court should disregard Texas's request (Br. 9-12) that it upend decades of settled jurisprudence and hold that the Fourth Amendment does not ordinarily require a warrant to search a private home. Texas's argument would require a complete reconceptualization of the Warrant Clause. This Court generally does not consider such sweeping arguments raised only by *amici*. *See Robertson* v. *Seattle Audubon Soc'y*, 503 U.S. 429, 441 (1992). And Texas's argument is particularly tangential to the questions presented here, which *presuppose* a Fourth Amendment violation and involve only the scope of immunity.

### A. This Court's Longstanding Jurisprudence Strikes An Appropriate Balance That Should Not Be Unsettled

As noted in Part I, *supra*, this Court has long struck a careful balance between the broad remedial purposes of § 1983 and the need to give adequate breathing room to law enforcement officials competently performing their duties. A critical element of that balance is the requirement set forth in *Malley* that police officers exercise "reasonable professional judgment." 475 U.S. at 346. This rule is quite forgiving of law enforcement officers. It leaves them room to act with confidence at the outer perimeter of their authority, and it shields officers who make reasonable mistakes. *See id.* at 343.

What immunity doctrine properly does not do, however, is turn warrant-seeking into an absolute shield against liability. Nor is an officer immune from liability merely because he acts without malice. While warrants protect reasonable officers, they do not give a free pass to the "plainly incompetent"; using professional judgment in carrying out official duties is an essential component of acting "reasonably." *See Malley*, 475 U.S. at 341, 346. *Malley* recognized that this rule was consistent with congressional intent, good policy, and necessary to prevent a conflict with principles of qualified immunity set forth in *Harlow*. *Id.* at 339-345.

*Stare decisis* weighs heavily against petitioners' request to uproot this Court's settled qualified immunity jurisprudence. While *stare decisis* is not an "inexorable command," this Court has repeatedly recognized that respect for precedent is an "'indispensable'" value. *Planned Parenthood* v. *Casey*, 505 U.S. 833, 854 (1992). Accordingly, this Court reconsiders its past

holdings only when there is a "'special justification,'" *Dickerson* v. *United States*, 530 U.S. 428, 443 (2000), such as when the past holding has been found to be unworkable or has been undermined by subsequent decisions, *see Arizona* v. *Gant*, 129 S. Ct. 1710, 1727-1728 (2009) (Alito, J., dissenting) (cataloging cases).[23]

Petitioners challenge this Court's considered judgment in *Malley* on several grounds, none persuasive. It is worth noting first an argument that petitioners omit. This Court, at petitioners' request, granted review to consider whether "the *Malley/Leon* standards" should be "reconsidered or clarified in light of the lower courts' [purported] inability to apply them." Pet. i. Yet petitioners' merits brief nowhere contends that the lower courts have struggled with *Malley* or found it unworkable. Their silence on a question that they presented to this Court is telling.[24]

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[23] Petitioners have not shown that *Malley* has been undermined by subsequent decisions. To the contrary, in *Groh*, this Court explicitly reaffirmed that officers have a "duty to ensure that the warrant conforms to constitutional requirements." 540 U.S. at 563 n.6.

[24] In their petition for certiorari, petitioners attempted to establish the supposed unworkability of the *Malley/Leon* standard by noting that a handful of decisions—most of which related to the exclusionary rule, not qualified immunity—produced dissents. Pet. 29-39. It is hardly surprising, however, that, in the twenty-seven years since *Leon* was decided, judges have occasionally disagreed about its application in a diverse array of circumstances, particularly given how frequently exclusionary rule issues are litigated. If judicial disagreement over the application of a legal standard to particular facts were conclusive evidence that a standard this Court had adopted was unworkable, this Court would be doing little else than reconsidering its previous decisions.

Having abandoned their argument that the *Malley* standard is unworkable, petitioners instead offer various policy arguments against the *Malley* rule. Again, however, one argument is notable for its absence. Nowhere do petitioners offer evidence—or even a contention—that *Malley* has frequently resulted in officers inappropriately being held liable for executing invalid warrants (or even being forced to go to trial on such allegations). Neither does the United States or Texas make such an argument, or argue that officers have been chilled in their duties by such a prospect. Nor does any *amicus* organization of law enforcement officers appear before this Court with such a submission. If the narrow exception to immunity that *Malley* recognized for officers who have not exercised reasonable professional judgment were having deleterious effects on law enforcement, one would expect some evidence of it—but none is offered to this Court. Given that petitioners must persuade this Court that *Malley* should be overruled, the absence of this showing is a grave defect in their argument.

Petitioners do argue that, unless a warrant effectively frees officers from responsibility to ensure that probable cause supports a search, "an officer, in borderline situations, may opt to effect a warrantless arrest or search." Br. 37. But this argument ignores that officers have many incentives to seek a warrant for the significant protection it provides, including the deference to the magistrate's probable cause determination and the preference accorded to warrants in close cases. *See United States* v. *Ventresca*, 380 U.S. 102, 106, 109 (1965). Even if that protection is not absolute, officers will continue to seek warrants, not least because some searches are "presumptively *unreasonable*" unless conducted pursuant to a warrant. *Groh*, 540 U.S. at 559

(emphasis added); *Payton*, 445 U.S. at 586. And petitioners produce no evidence that officers in fact are currently forgoing warrants.

Petitioners also assert (Br. 37) that the *Malley* rule is unnecessary because "[o]fficers have little incentive to submit a patently inadequate warrant application because in most circumstances, a reasonable magistrate will refuse the warrant." But as *Malley* recognized, even if the likelihood of obtaining a warrant in the complete absence of probable cause is comparatively small, "ours is not an ideal system, and it is possible that a magistrate, working under docket pressures," may approve an inadequately supported warrant. 475 U.S. at 345-346. If officers no longer faced any repercussions for seeking plainly inadequate warrants, they would have no incentive to engage in desirable "reflection" before making an application. *Id.* at 343; *cf. Stone* v. *Powell*, 428 U.S. 465, 492 (1976) ("exclusion ... discourage[s] law enforcement officials from violating the Fourth Amendment"). The number of deficient applications would, accordingly, rise. And there would be a corresponding increase in the number of citizens subjected to searches that violate the Fourth Amendment. Fostering this outcome would unacceptably undermine the Constitution's protection against unreasonable searches and seizures.

Finally, *stare decisis* carries "special force" in this case because the challenged holding relates to the scope of a statutory provision. *See Global-Tech Appliances, Inc.* v. *SEB S.A.*, 131 S. Ct. 2060, 2068 (2011); *Owen* v. *City of Independence*, 445 U.S. 622, 635 (1980) ("the scope of ... immunity from liability under § 1983 is essentially one of statutory construction"). Congress has the authority to fix any potential over-expansiveness of § 1983 and, were Congress dissatisfied with *Malley*, it

could amend that statute to explicitly immunize police officers who have obtained warrants. *See Crawford-El* v. *Britton*, 523 U.S. 574, 601 (1998) (Kennedy, J., concurring) (noting that authority to fix potential over-expansiveness of § 1983 "lies with the Legislative Branch, not with us"). Yet in the past 25 years, Congress has taken no action to amend the statute.[25]

### B. This Court's Recent Exclusionary Rule Cases Do Not Suggest A Contrary Result

In attacking the decision below, petitioners and their *amici* repeatedly invoke this Court's recent exclusionary rule decisions, most notably *Herring* v. *United States*, 555 U.S. 135 (2009). *See* Pet. Br. 31, 48-49 (citing *Herring* for the proposition that negligence or innocent mistake cannot support exclusion); U.S. Br. 21. They imply that *Herring* expanded qualified immunity and effectively disapproved *Malley*'s denial of immunity to officers who failed to exercise reasonable professional judgment. But *Herring* is fully consistent with *Malley*. In *Herring*, a wholly blameless officer performed an arrest in reliance on what turned out to be a negligent entry in a database maintained by police in a neighboring county. The Court found exclusion to

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[25] This case is distinguishable from *Pearson* v. *Callahan*, 555 U.S. 223 (2009), because it concerns the substantive scope of qualified immunity rather than the process through which qualified immunity questions are judicially resolved. In *Pearson*, this Court noted that the *Saucier* rule was akin to a procedural or evidentiary rule and that it concerned "internal Judicial Branch operations." *Pearson*, 555 U.S. at 233-234. Thus, any alteration to that process would naturally "come from this Court, not Congress." *Id.* The *Malley* rule, by contrast, directly pertains to the scope of § 1983, and is squarely within the domain where Congress would be expected to act.

be unwarranted, reasoning that any marginal deterrence from suppression was not justified under the exclusionary rule because the mistake resulted from "isolated negligence attenuated from the arrest." 555 U.S. at 137.

If *Herring* had been a § 1983 suit, there can be little question that the arresting officer in *Herring* would have been entitled to qualified immunity. He behaved in an objectively reasonable manner when he made the arrest based on the database entry. The officer was not responsible for the database error and had no reason to know that the arrest was erroneous. He thus would have been entitled to protection under *Harlow* and *Malley*, which ensure protection for reasonable mistakes. *See United States* v. *Hensley*, 469 U.S. 221, 232 (1985) (noting that an officer who reasonably relies on incorrect information provided by another jurisdiction "may have a good-faith defense to any civil suit").

In any event, policy concerns regarding the appropriate scope of the exclusionary rule should not automatically control whether the Millenders will be able to obtain redress for the violation of their constitutional rights. Although the Court has at times (including in *Malley*) described the *Leon* good-faith exception to the exclusionary rule as being coextensive with the *Malley* qualified immunity rule, there are several important differences between the doctrines that militate against slavishly applying an alteration in one to the other.[26]

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[26] Notably, in *Malley*, where the two doctrines were first intertwined, the Court noted that it would be "incongruous" for qualified immunity to be *less* protective of constitutional rights than the exclusionary rule. 475 U.S. at 344. The Court did not say that the scope of qualified immunity should always track the ex-

First, qualified immunity delimits the reach of a statute, § 1983. The good-faith exception to the exclusionary rule, by contrast, "is a judicially created exception to [a] judicially created rule." *Davis* v. *United States*, 131 S. Ct. 2419, 2434 (2011). Accordingly, the Court has more latitude to revise its exclusionary rule jurisprudence than it has to alter the scope of qualified immunity.

Second, § 1983 and the exclusionary rule do not serve identical purposes. "[T]he *sole* purpose of the exclusionary rule is to deter misconduct by law enforcement." *Davis*, 131 S. Ct. at 2432; *see also Leon*, 468 U.S. at 906 (noting that "the exclusionary rule is neither intended nor able to cure the invasion of the defendant's rights which he has already suffered." (internal quotation marks omitted)). Section 1983, by contrast, was enacted not only to deter misconduct, but also to "provide compensation" and "vindicat[e] cherished constitutional guarantees." *See Owen*, 445 U.S. at 651.

Third, as this Court noted in *Malley*, "in the case of the § 1983 action, the likelihood is obviously greater than at the suppression hearing that the remedy is benefiting the victim of police misconduct one would think most deserving of a remedy—the person who in fact has done no wrong, and has been arrested for no reason, or a bad reason." 475 U.S. at 344. These differences in equities explain why courts (including this Court) have declined to suppress evidence based on Fourth Amendment violations even when recognizing

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clusionary rule in all instances, or that any future restrictions on the exclusionary rule should necessarily be incorporated into qualified immunity doctrine.

that the officers who committed the violations may be liable under § 1983. In *Hudson* v. *Michigan*, 547 U.S. 586, 598 (2006), this Court held that violations of the "knock-and-announce" rule would not lead to exclusion, but noted that civil suits would remain available as a means to deter and remediate violations, and suggested that qualified immunity would not bar recovery of damages under § 1983 in such cases.[27] In light of these considerations, the *Malley* rule should be preserved even if there is a narrow divergence between qualified immunity and the exclusionary rule.

Finally, even if *Herring* announces a new rule that modifies *Malley* and that rule is applicable to the qualified immunity analysis, qualified immunity should still be denied here. This case does not involve garden-variety negligence that is attenuated from the search. Rather, given the complete lack of fit between the warrant and the supporting affidavit, the search and seizure at issue was at least grossly negligent. No reasonable officer could have possibly concluded that the domestic assault at issue constituted grounds for a far-ranging search of an innocent family's home for a broad class of "any" firearms, indicia of gang membership, and photographic evidence of "criminal activity." Holding the police accountable will provide the Millenders

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[27] *See also United States* v. *Cazares-Olivas*, 515 F.3d 726, 729 (7th Cir. 2008) (suggesting that the evidence in *Groh* would not have been suppressed even though the officer was not immune); *United States* v. *Rosa*, 626 F.3d 56, 66 (2d Cir. 2010) (noting that "while the objective inquiries underlying the good-faith exception and qualified immunity are the same, ... [suppression] requires the additional determination that the officer's conduct was 'sufficiently deliberate that exclusion can meaningfully deter it'") (petition for certiorari pending).

both some measure of redress for the constitutional wrong they have suffered, and will deter future abuses of this type. Imposing liability here is wholly consistent with both the purposes of § 1983 and this Court's qualified immunity precedents.

## CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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OCTOBER 2011

# REPLY BRIEF

No. 10-704

# In The Supreme Court of the United States

CURT MESSERSCHMIDT and ROBERT J. LAWRENCE,

*Petitioners,*

vs.

AUGUSTA MILLENDER, BRENDA MILLENDER, and WILLIAM JOHNSON,

*Respondents.*

**On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

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## ARGUMENT

### I. THE OFFICERS ARE ENTITLED TO QUALIFIED IMMUNITY BECAUSE THEY COULD REASONABLY BELIEVE PROBABLE CAUSE SUPPORTED THE WARRANT.

This Court's jurisprudence establishes that when an officer relies on a warrant later determined invalid, the officer's conduct should be deemed "objectively reasonable," and qualified immunity should apply, absent egregious circumstances essentially rendering the warrant process meaningless. (Brief of Petitioners ["Pet.Br."]19-38.)

Respondents do not directly address petitioners' analysis. Rather, they assert *Malley v. Briggs*, 475 U.S. 335 (1986), and *Groh v. Ramirez*, 540 U.S. 551 (2004), imposed an independent duty on officers to exercise "reasonable professional judgment," and the officers here were "plainly incompetent" in seeking a general warrant they should have known was unsupported by probable cause. (Brief for Respondents ["Resp.Br."]19-20, 45.)

Respondents are wrong. The officers had a logical basis for believing probable cause supported the warrant, and no clearly established law would have notified them they should not even have sought a determination of probable cause.

### A. The Officers Could Reasonably Believe There Was A "Fair Probability" Bowen Kept Firearms At Plaintiffs' Residence And They Were Subject To Seizure.

Probable cause exists when, given the totality of the circumstances, "there is a fair probability that contraband or evidence of crime will be found in a particular place." *Illinois v. Gates*, 462 U.S. 213, 238 (1983).

Respondents argue Bowen's assault on Kelly with a particular firearm did not establish probable cause to seize other firearms at plaintiffs' residence, because there was no reason to suspect Bowen possessed other firearms or kept them at plaintiffs' residence. (Resp.Br.33.) Respondents and *amici* also note that guns at plaintiffs' residence might lawfully belong to "innocent" persons and be protected by the Second Amendment. (Resp.Br.33 & n.16, 36 n.17; NRA Amicus Br.26-29, 34-36.)

They ignore the obvious. Bowen was a gang member who had threatened and attempted to murder his girlfriend in public by shooting at her repeatedly with a sawed-off shotgun – an illegal weapon associated with gangs, which commonly possess and use firearms illegally. (Pet.Br.40.) Bowen had an extensive criminal history including prior felonies with numerous assault and weapons charges. (Pet.Br.41-42.) Many circuits have held that prior arrests or convictions, particularly involving similar conduct, can help establish probable cause. *United*

*States v. Conley*, 4 F.3d 1200, 1207 (3d Cir. 1993) (citing cases); *United States v. Ryan*, 293 F.3d 1059, 1062 (8th Cir. 2002). Given the circumstances, the officers could draw the "common-sense conclusion[ ]" that there was at least a "fair probability" Bowen possessed other firearms. *Gates*, 462 U.S. at 231, 238. (Pet.Br.39-43.) Because the officers had probable cause to believe Bowen was living or staying at plaintiffs' residence, there was a fair probability he would keep such firearms there and hide them anywhere on the premises. (Pet.Br.43-44.) And because he was a felon who had threatened and attempted to kill his girlfriend, there was at least a fair probability those weapons could be lawfully seized. (Pet.Br.44-46.)

That firearms may be lawfully owned or constitutionally protected, or might belong to residents not suspected of crime, does not render the search for them invalid. Constitutionally protected items may be the proper subject of a search warrant. *United States v. Rubio*, 727 F.2d 786, 791-92 (9th Cir. 1984). And "search warrants are directed, not at persons, but at property where there is probable cause to believe that instrumentalities or evidence of crime will be found"; thus, property owned or occupied by "innocent" persons may be searched under a valid warrant. *Conley*, 4 F.3d at 1207; *Zurcher v. Stanford Daily*, 436 U.S. 547, 554, 556 (1978).

Respondents attempt to distinguish cases recognizing the close nexus between guns and drug trafficking, arguing the affidavit linked Bowen not to

drug trafficking but only to a "spousal assault." (Resp.Br.34.) Respondents miss the point. If guns are tools of the drug trade, justifying a search for them based on evidence of drug dealing, then surely guns are tools of illegal firearms activity – *i.e.*, there is probable cause to search for firearms when a member of a gang, an association commonly linked with violent crime and illegal weapons, actually fires an illegal weapon at a person. (Pet.Br.42-43.)

Further, Bowen's crime was no ordinary "spousal assault," but attempted murder by a gang member and felon with a sawed-off shotgun. The notion that officers could lawfully search only for a sawed-off shotgun and were required to leave any other weapons that might belong to Bowen for his later use in a renewed attack on Kelly, defies common sense. Nothing in this Court's case law compels this nonsensical result, and – as expressly recited in the warrant (JA48) – California law squarely authorizes seizure of items possessed with the intent to use them as a means of committing a crime. (Pet.Br.44.) Respondents conspicuously fail to address this point.

### B. Bowen's Felon Status Additionally Established Probable Cause, And Its Omission From The Affidavit Was A Reasonable "Mistake Of Fact" To Which Qualified Immunity Applies.

As noted, the affidavit amply supported probable cause for the search. Yet, petitioners could also

believe probable cause existed based on Bowen's status as a felon barred from possessing firearms, with an extensive criminal history. Messerschmidt's omission of this information from the affidavit was at the very least a reasonable "mistake of fact" warranting qualified immunity. (Pet.Br.47-51.)

Respondents argue *Gates*, 462 U.S. at 238-39, and *Whiteley v. Warden*, 401 U.S. 560, 565 n.8 (1971), prohibit courts from considering information supporting probable cause known to the officer but withheld from the magistrate. (Resp.Br.36-37.) Both decisions address a warrant's validity under the Fourth Amendment, not qualified immunity. Moreover, *Whiteley* involved a conclusory, "bare-bones" affidavit. *Whiteley*, 401 U.S. at 565 & n.8. These cases do not address whether an officer is entitled to qualified immunity where, as here, he submits a detailed affidavit he could reasonably believe establishes probable cause, or reasonably fails to realize he has omitted a fact that would help establish probable cause.

On the other hand, this Court has explicitly stated that qualified immunity applies to reasonable mistakes of fact. *Pearson v. Callahan*, 555 U.S. 223, 231 (2009); *Groh*, 540 U.S. at 567 (Kennedy, J., dissenting); *Butz v. Economou*, 438 U.S. 478, 507 (1978). In the suppression context, the Court has also repeatedly found officers acted in objective good faith where they obtained warrants based on reasonable but mistaken factual assumptions. (Pet.Br.48-49 [discussing cases].)

Respondents cite Ninth Circuit suppression cases holding that courts may not consider information known to the officer but omitted from the affidavit, at least where the affidavit lacks any indicia of probable cause. *United States v. Hove*, 848 F.2d 137, 140 (9th Cir. 1988); *United States v. Luong*, 470 F.3d 898, 902 (9th Cir. 2006). (Resp.Br.38.) These decisions contradict well-reasoned decisions of the majority of circuits holding that, given this Court's direction in *Leon* to consider "all the circumstances" in determining whether an officer has reasonably relied on a warrant, it is appropriate to consider facts known to the officer but never presented to the magistrate. *See United States v. Martin*, 297 F.3d 1308, 1318-19 (11th Cir. 2002) (collecting cases); *United States v. Leon*, 468 U.S. 897, 922 & n.23 (1984). Indeed, both *Hove* and *Luong* produced dissents finding the good-faith exception applicable because the officers knew facts not included in the affidavit that supported a colorable probable-cause determination. *Hove*, 848 F.2d at 141 (Lovell, J., dissenting); *Luong*, 470 F.3d at 905-07 (Callahan, J., dissenting).

Respondents concede courts may appropriately consider facts omitted from an affidavit if "there are sufficient indicia of probable cause to make an officer's reliance on the warrant 'not entirely unreasonable'" – *i.e.*, when an officer makes "a mistaken but reasonable judgment" that facts presented to the magistrate establish probable cause. (Resp.Br.38-39.) Here, the officers did so – they submitted a detailed affidavit that established a logical basis for believing

they would likely find firearms at plaintiffs' residence and those firearms would be subject to seizure. Significantly, both *Hove* and *Luong* stated the test for whether an affidavit is "so deficient" that officers cannot reasonably believe it establishes probable cause is "whether the affidavit was sufficient to 'create disagreement among thoughtful and competent judges as to the existence of probable cause.'" *Hove*, 848 F.2d at 139; *Luong*, 470 F.3d at 903. Here, two dissenting judges concluded probable cause supported the search for all firearms at plaintiffs' residence even considering only the facts in the affidavit. (App.41-42 & n.1.)

Respondents assert that if officers know information not presented to the magistrate can save a defective warrant, they will "become careless" in ensuring that they give the magistrate all the information relevant to probable cause. (Resp.Br.39.) But an officer who bothers to seek a warrant has every incentive to include all facts he knows that might help establish probable cause, because if he leaves out important facts he probably will not get a warrant. Accordingly, this Court has never expressed concern about officers withholding facts that help establish probable cause; rather, the Court has been concerned only when officers procure a warrant by intentionally making false statements that establish probable cause, or omitting exculpatory facts. *See Franks v. Delaware*, 438 U.S. 154, 155, 168, 171 (1978). Moreover, the Court has been concerned not with mere carelessness or negligence, but only with

deliberate or reckless misrepresentations. *Id.* at 168, 170-71; *see also Leon*, 468 U.S. at 923. Similarly, qualified immunity is intended to protect "all but the plainly incompetent or those who knowingly violate the law." *Malley*, 475 U.S. at 341.

Respondents argue that considering information not presented to the magistrate encourages officers, after a warrant is challenged, to falsely assert they had such information. (Resp.Br.39-40.) But no such thing happened here; Messerschmidt undisputedly knew Bowen's criminal history and felon status when he sought the warrant. (App.8, 25 & n.7; JA21, 28-29.) Moreover, respondents' concern is misplaced because to receive qualified immunity, officers must affirmatively prove that they knew the omitted facts when they sought a warrant. If they can do so, they *should* receive qualified immunity.

Respondents assert Messerschmidt did not actually make a mistake, because he testified he did not omit any important information from the affidavit. (Resp.Br.41 & n.21.) But Messerschmidt's testimony simply confirms he viewed the affidavit from a "commonsense" perspective rather than as a "legal technician[ ]," *Gates*, 462 U.S. at 230-31, and accordingly believed it was accurate.

Respondents urge that it is contradictory to say the officers presumptively acted in good faith by relying on a warrant, yet are "entitled to the benefit of material they withheld from the magistrate." (Resp.Br.41-42.) Respondents miss the point. That an

officer has sought or relied on a warrant bespeaks the officer's good faith. This is no less so when the officer makes a reasonable mistake by inadvertently omitting from a detailed affidavit a fact that might bolster a showing of probable cause. Respondents' argument might apply if an officer *intentionally* withheld information from the magistrate – but again, no officer would have any incentive to omit information that would increase the chances of obtaining a warrant.

Respondents assert the issue is further "complicat[ed]" because Messerschmidt omitted facts from his affidavit that might have undermined probable cause – specifically, Kelly said Bowen was merely "hiding out" at plaintiffs' residence, and Bowen had stayed there only temporarily since being raised there as a foster child 15 years earlier. (Resp.Br.40-41 n.20.) According to plaintiffs, these facts suggest Bowen would neither be found at plaintiffs' residence nor stash firearms there. (*Id.*) But this argument has no bearing on whether the Court should consider facts omitted from the affidavit that would *help* establish probable cause.

Moreover, as the dissent noted (App.60-61 & n.15), plaintiffs lost these issues in the district court and did not revive them on appeal. The district court found (1) the affidavit established probable cause to believe Bowen would be found at plaintiffs' residence (JA307, 310-11), (2) Messerschmidt's statement in the affidavit that Bowen "resided" there was not a misrepresentation (JA316), and (3) Messerschmidt acted reasonably in failing to include Kelly's actual words –

*i.e.*, that Bowen might be "staying at" or "hiding out" at plaintiffs' residence – and the fact his computer searches revealed alternative addresses for Bowen (JA316-19). The court further noted Bowen's foster mother's home was a logical place for him to be staying. (JA318-19.)

The district court denied plaintiffs' application for an order certifying an interlocutory appeal regarding whether the affidavit established probable cause to believe Bowen would be found at plaintiffs' residence. (JA385-94; Order filed 5/25/07 [docket #114], at 13-14.) Plaintiffs did not raise the issue in the Ninth Circuit. (*See* Appellees' Answering Brief, filed 1/23/08 [9th Cir. docket #19], at 16-30; App.60-61 & n.15.) Thus, they cannot resurrect it here. *Cutter v. Wilkinson*, 544 U.S. 709, 719 n.7 (2005) (declining to consider arguments rejected by district court and not addressed by court of appeals); *see also Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 379 n.5 (1996) ("we generally do not address arguments . . . not the basis for the decision below").

Respondents also argue the "objective reasonableness" standard precludes "examination of an officer's subjective knowledge or state of mind." (Resp.Br.40, citing *Harlow v. Fitzgerald*, 457 U.S. 800, 815 (1982).) While *Harlow* held that an officer's state of mind, *i.e.*, motive and "intentions," would be irrelevant to qualified immunity, *id.* at 815, the Court nowhere used the term "subjective knowledge."

Moreover, in considering information Messerschmidt knew but inadvertently omitted from the affidavit, the Court need not examine the officers' state of mind – *i.e.*, whether they acted with malice or actually knew they were violating constitutional rights. Rather, the question is whether the officers reasonably "could have believed [their actions] lawful, in light of clearly established law *and the information the officers possessed*" – an inquiry this Court has held proper. *Wilson v. Layne*, 526 U.S. 603, 615 (1999); *Anderson v. Creighton*, 483 U.S. 635, 641 (1987). Put differently, as Justice Kennedy explained in *Groh*, 540 U.S. at 566, the question is "whether someone in the officer's position could reasonably but mistakenly conclude that his conduct complied with the Fourth Amendment." As explained, Messerschmidt could reasonably believe his detailed affidavit established probable cause, and could reasonably fail to notice he had omitted Bowen's felon status.

### C. The Officers Could Reasonably Believe There Was Probable Cause To Search For Gang-Related Items.

Respondents contend the officers could not reasonably have relied on the warrant's authorization to search for gang-related items because Bowen's attack on Kelly was not gang-related. (Resp.Br.27-28.) But as petitioners explained, since Bowen was a gang member and felon who had fired a sawed-off shotgun at someone in public, Messerschmidt, a gang specialist, could reasonably have believed that Bowen's

possession or concealment of the gun might be related to his gang membership, or that gang paraphernalia might help tie Bowen to firearms found at plaintiffs' residence. (Pet.Br.51-52.) Bowen's gang membership was relevant, just as a suspect's membership in a terrorist organization would be relevant had he attempted to murder his girlfriend with a chemical weapon or bomb.

Respondents assert gang paraphernalia could not tie Bowen to items at plaintiffs' residence because other Mona Park Crip gang members also lived there. (Resp.Br.29; *see* JA28.) Nonetheless, gang-related items were relevant; they might have been found next to the sawed-off shotgun or contain Bowen's moniker. Or, Kelly or the other residents might be able to identify the items as Bowen's.

Respondents criticize Messerschmidt's description of his previous gang experience as "boilerplate," citing *United States v. Weber*, 923 F.2d 1338, 1345 (9th Cir. 1990), where an expert's experience with pedophiles was irrelevant because the affidavit did not indicate the suspect was a pedophile. (Resp.Br.29.) Here, Bowen undisputedly was a gang member and had committed a crime using an illegal weapon associated with gangs.

Respondents also challenge the warrant's gang-related provisions because they sought items "showing . . . affiliation with any Street Gang" – not just Mona Park Crips – and photographs depicting "evidence of criminal activity." (Resp.Br.29-30; JA52.)

Plaintiffs never challenged the former provision below, and the district court did not rule on either provision. (*See* JA331-33.) Plaintiffs also failed to challenge these provisions in the Ninth Circuit, and the court did not address them. (*See* Appellees' Answering Brief [9th Cir. docket #19], at 22-25; App.28-29, 63-64, 75.) Thus, this Court should not consider respondents' newly minted argument. *Cutter*, 544 U.S. at 719 n.7; *Matsushita Elec. Indus. Co.*, 516 U.S. at 379 n.5.

Regardless, the officers reasonably sought to search for items related to "any" gang because Messerschmidt knew Bowen was a member of at least one other gang. (3ER 561, 8ER [videotape]; JA39, 64; *see* JA19, 21.)

The officers also reasonably sought approval to search for photographs depicting "evidence of criminal activity." This phrase appears in a paragraph seeking various types of gang-related items, including "photographs or photograph albums depicting" items "relevant to gang membership, . . . or which may depict *evidence of criminal activity*." (JA52, emphasis added.) Since gangs by their nature regularly engage in numerous types of criminal activity, *see People v. Gardeley*, 927 P.2d 713 (Cal. 1997), photographs depicting evidence of criminal activity might be gang-related and thus would constitute indicia of gang membership.

Moreover, the officers could reasonably believe the phrase "evidence of criminal activity" referred to

*gang-related* criminal activity. The D.C. Circuit has held "a warrant's catch-all phrase must be read in light of the items that precede it," and thus the phrase "any other evidence of a violation of [a specified statute]" was not overbroad because, read in context, it referred to evidence of such violations concerning a specific victim. *United States v. Pindell*, 336 F.3d 1049, 1053 (D.C. Cir. 2003); *see also United States v. Potts*, 586 F.3d 823, 834 (10th Cir. 2009) (applying good-faith exception on similar facts); *United States v. Rosa*, 626 F.3d 56, 58, 64-65 & n.3 (2d Cir. 2010) (applying good-faith exception where warrant authorized search of computer equipment identifying "criminal conduct," but supporting documents referred to child pornography).

Messerschmidt also knew when he sought the warrant that Bowen had an extensive criminal record including numerous assault and weapons charges with several felony convictions, and was on probation. (JA21, 26-29; *see* JA70-71.) Prior arrests and convictions can help establish probable cause. *Conley*, 4 F.3d at 1207 (citing cases); *Ryan*, 293 F.3d at 1062; *see United States v. Harris*, 403 U.S. 573, 583 (1971). This Court has also recognized a "probationer 'is more likely than the ordinary citizen to violate the law.'" *United States v. Knights*, 534 U.S. 112, 120 (2001). Thus, since Bowen had committed yet another crime using an illegal weapon, the officers could reasonably have believed there was a fair probability he was committing other crimes. Moreover, Messerschmidt knew Bowen had photographed himself posing with

an illegal weapon (3ER 557, 629; 8ER [videotape]), and could reasonably infer Bowen might have photos evidencing his other crimes.

Finally, even assuming the authorization to search for photographs depicting "evidence of criminal activity" was overbroad, this overbreadth did not expand the scope of the search. The district court found the officers had probable cause to search for evidence of control of the premises (JA333-34), which could include photographs – *e.g.*, a photo showing Bowen at plaintiffs' residence might suggest he lived there. Thus, a search for photos depicting evidence of criminal activity would not encompass any additional areas. Accordingly, applying qualified immunity here is consistent with this Court's direction to avoid applying hypertechnical standards when reviewing warrants. *See Groh*, 540 U.S. at 570-71 (Kennedy, J., dissenting).

Indeed, plaintiffs' newfound focus on language that went unnoticed by a magistrate, a district judge, 11 appellate judges, and even plaintiffs' own attorneys confirms that the officers acted reasonably in failing to notice any deficiency, and is emblematic of the sort of *ex post facto* nitpicking of warrants that has become a ubiquitous part of the legal landscape.

### D. Respondents Have Identified No Cases Clearly Establishing The Warrant Was Unconstitutional.

Respondents and *amici* contend the law "clearly established" the warrant's authorization to search for firearms and gang-related items was unconstitutional. (Resp.Br.21-26; NRA Amicus Br.26-37.) But they fail to identify any "controlling authority" or "a robust 'consensus of cases of persuasive authority'" establishing the warrant's unconstitutionality "beyond debate," as required to defeat qualified immunity. *Ashcroft v. al-Kidd*, 131 S.Ct. 2074, 2083-84 (2011).

Respondents cite (1) the Fourth Amendment's probable cause and particularity requirements, (2) this Court's decisions prohibiting "general, exploratory" searches, and (3) Ninth Circuit cases holding a warrant's scope must be limited to the extent of the probable cause. (Resp.Br.21-23.) Yet, this Court has "repeatedly" admonished courts "not to define clearly established law at a high level of generality," because general propositions do not help determine "whether the violative nature of *particular* conduct is clearly established." *al-Kidd*, 131 S.Ct. at 2084 (emphasis added); *Anderson*, 483 U.S. at 639, 644. Rather, clearly established law must be determined "'in light of the specific context of the case.'" *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004).

This Court has stated that "'novel factual circumstances,'" even if not "outrage[ous]," may violate clearly established law. *Safford Unified School Dist.*

*v. Redding*, 129 S.Ct. 2633, 2643 (2009). But the Court has denied qualified immunity in such circumstances only in cases involving egregious conduct – for example, where officers handcuffed a prisoner to a "hitching post" shirtless, in hot sun, for seven hours with little water and no bathroom breaks – conduct involving "obvious," unnecessary "cruelty." *Hope v. Pelzer*, 536 U.S. 730, 745 (2002). Similarly, a judge who sexually assaulted five women had "fair warning" his conduct was unconstitutional. *United States v. Lanier*, 520 U.S. 259, 271 (1997) (conviction under 18 U.S.C. §242). These holdings mirror *Malley*'s admonition that qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." *Malley*, 475 U.S. at 341.

Respondents cite Ninth Circuit cases that "invalidated warrants authorizing a search for a general class of items when probable cause existed only for specific items within that class." (Resp.Br.24-25.) None of these cases involved facts where a gang member and felon attempted murder using an illegal weapon associated with gangs, and officers sought a warrant to search the suspect's residence or hideout for firearms or gang-related items – or anything close. Respondents and *amici* fail to identify any case invalidating a search for "all firearms" where a specific firearm is used, or holding that although officers can search for guns based on suspected drug activity, they cannot infer the presence of firearms based on a gang member's assault with an illegal firearm. Or suggesting that gang indicia is irrelevant

to the possession or concealment of an illegal weapon associated with gangs and used by a gang member to commit a crime.

Rather, respondents cite cases invalidating unlimited searches for documents or jewelry – items that, given the circumstances, were not inherently dangerous, associated with the crime at issue, or illegal for the suspect to possess. For example, in *United States v. Kow*, 58 F.3d 423, 427 (9th Cir. 1995), the warrant "authorized the seizure of virtually every document and computer file at [defendants' business]," even though there was no basis to believe all documents could be evidence of crime. *See also VonderAhe v. Howland*, 508 F.2d 364, 369 (9th Cir. 1974) (similar facts); *United States v. Bridges*, 344 F.3d 1010, 1017-18 (9th Cir. 2003) (same); *United States v. Stubbs*, 873 F.2d 210, 211-12 (9th Cir. 1989) (same). In *United States v. Spilotro*, 800 F.2d 959, 965 (9th Cir. 1986), a warrant authorized a search for all gemstones and jewelry at defendant's jewelry store, although agents suspected only a few stolen diamonds and had no reason to believe they might find more. Similarly, the cases cited from other circuits (Resp.Br.25 n.12) involve searches for essentially all documents or media at a business, or unspecified "evidence," without any reason to believe there might be probable cause to search for all such items.

Here, in contrast, Bowen was a gang member and felon who had shot at someone with an illegal firearm associated with gangs; the officers had reason to believe he would have multiple illegal firearms,

and gang indicia would be relevant to his use, possession or concealment of such weapons.

## II. THE WARRANT'S PURPORTED OVERBREADTH DID NOT EXPAND THE SCOPE OF THE SEARCH.

Petitioners explained the officers should not be denied qualified immunity based on a hypertechnical reading of the warrant, partly because the purported overbreadth did not expand the search beyond areas otherwise properly searched. (Pet.Br.63-65.)

Respondents assert *Groh*, 540 U.S. at 560, rejected the contention that a defective warrant may be cured because the defect did not expand the scope of the search. (Resp.Br.43.) But that portion of the opinion addresses the warrant's validity, not qualified immunity. In addressing qualified immunity, the majority held that because the warrant was facially invalid, no reasonable officer could rely on it. *Groh*, 540 U.S. at 563. The Court never suggested that for qualified immunity purposes, courts cannot consider whether a defect unapparent on the warrant's face expanded the search.

Respondents further argue (1) Justice Kennedy's dissent is inapposite because *Groh* involved a "clerical error," unlike here where the warrant lacked probable cause, and (2) the authorization to search for gang-related items and photographic indicia of criminal activity expanded the search by allowing the officers to examine plaintiffs' dresser drawers and photo

albums. Yet, there was probable cause to search for all firearms and gang-related items in plaintiffs' residence. (Pet.Br.40-46, 51-52.) Moreover, the majority found probable cause to search for disassembled parts of the sawed-off shotgun, which could fit into a dresser drawer. (App.20, 43 & n.4.) And the district court found probable cause to search for evidence of control of the premises, which could include photographs. (JA333-34; §I.C, *supra*.)

Respondents contend the warrant expanded the scope of the seizure because Augusta Millender's gun and ammunition were seized. They overlook that there was probable cause to search for *all* firearms at plaintiffs' residence. (Pet.Br.40-46.) Because Bowen was a gang member and felon who had shot at someone with a sawed-off shotgun in public, and the officers reasonably believed he was living or staying at plaintiffs' residence, the officers had probable cause to believe Bowen had other firearms and would keep or hide them there, *anywhere on the premises*, and such firearms could be lawfully seized. (Pet.Br.43-46.) Thus, the officers had probable cause to seize Augusta Millender's gun and ammunition because there was a "fair probability" they were Bowen's. The issue is not whether some firearms at the premises could lawfully belong to third parties, but whether there was probable cause to believe any firearms found might belong to Bowen and thus be subject to seizure. (*See* §I.A, *supra*.)

## III. AS THIS COURT HAS RECOGNIZED, SOUND POLICY CONSIDERATIONS SUPPORT APPLYING UNIFORM STANDARDS FOR DETERMINING APPLICATION OF QUALIFIED IMMUNITY OR SUPPRESSION OF EVIDENCE ARISING FROM PROCUREMENT OF A WARRANT.

Respondents and *amici* criticize petitioners' reliance on this Court's exclusionary-rule decisions in analyzing qualified immunity. (Resp.Br.50-53; ACLU Amicus Br.15-20.) They urge the Court to depart from *Malley* insofar as it expressly incorporated "the same standard of objective reasonableness . . . applied . . . in *Leon*" in the suppression context. *Malley*, 475 U.S. at 344; *Groh*, 540 U.S. at 565 n.8. This argument is tied to an attempt to sidestep this Court's recent decision in *Herring v. United States*, 555 U.S. 135 (2009), which again emphasized that merely negligent conduct by a police officer cannot support suppression of evidence. *Herring*, 555 U.S. at 145-48.

As a threshold matter, numerous cases of this Court and circuit courts outside the suppression context explicitly state that officers are entitled to qualified immunity based on reasonable mistakes of fact. (Pet.Br.47-51.) In any event, as this Court recognized in *Malley*, when an officer procures a warrant later determined invalid, there is no principled reason for imposing a different standard for qualified immunity than for the exclusionary rule's good-faith exception.

Both doctrines balance the need to protect individual rights by deterring police misconduct, against the need to permit effective investigation and prosecution of crime. (Pet.Br.26-27.) As this Court has noted, exclusion is warranted only if its "deterrence benefits . . . outweigh its heavy costs" in the form of "suppress[ing] the truth" in criminal proceedings. *Davis v. United States*, 131 S.Ct. 2419, 2427 (2011); *see also Herring*, 555 U.S. at 141. Similarly, civil lawsuits against public officials, while necessary to vindicate constitutional guarantees and deter misconduct, entail "substantial social costs, including the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties." *Anderson*, 483 U.S. at 638; *Harlow*, 457 U.S. at 814; *Owen v. City of Independence*, 445 U.S. 622, 651 (1980). Although civil liability serves the additional purpose of compensating victims of unconstitutional conduct, ultimately that purpose too must be weighed against the danger that penalizing officers for reasonable, good-faith conduct (measured by objective standards) will deter officers from vigorously enforcing the law. *Anderson*, 483 U.S. at 638.

In the search-and-seizure context, this Court has expressed "a strong preference for warrants," because a warrant manifests an officer's good faith and interposes a neutral third party to safeguard constitutional rights. *Leon*, 468 U.S. at 913-14. The Court has emphasized that officers should be encouraged to seek warrants when they have probable cause.

*Malley*, 475 U.S. at 353-54 (Powell, J., concurring and dissenting). This policy does not change depending on whether the officer's conduct is assessed for purposes of suppression or civil liability. It would be confusing to give officers two different standards to follow, since they cannot know in advance whether the warrant will be challenged in the suppression or the civil liability context. In either context, subjecting officers to endless litigation based on hypertechnical interpretations of warrants will ultimately discourage them from seeking warrants when they have probable cause, or encourage them to rely on exceptions to the warrant requirement. *Malley*, 475 U.S. at 352-53 (Powell, J., concurring and dissenting); *Gates*, 462 U.S. at 263 (White, J., concurring). Contrary to respondents' assertion (Resp.Br.47-48), this is no less so because no one has performed an empirical study proving officers are being deterred from seeking warrants.

Finally, respondents and *amici* cite *Hudson v. Michigan*, 547 U.S. 586, 598 (2006) to argue officers may be held civilly liable for Fourth Amendment violations even if evidence is not suppressed. But *Hudson* involved execution, not procurement, of a warrant. The Court merely held that violations of the "knock and announce" rule do not require suppression of evidence found during a search, largely because such a violation is not a "but-for" cause of obtaining the evidence – regardless of the violation, the police would have executed the warrant and found the evidence. *Id.* at 592-94. No similar causation concerns

arise in the context of claims premised on the manner in which an officer procured a warrant.[1]

*Malley* properly recognizes the need to provide uniform standards for both evaluating qualified immunity and suppressing evidence. As petitioners have noted, however, other aspects of *Malley* warrant consideration by this Court.

## IV. *STARE DECISIS* DOES NOT FORECLOSE NECESSARY CLARIFICATION OR RECONSIDERATION OF THE AMORPHOUS "SO LACKING IN INDICIA OF PROBABLE-CAUSE" STANDARD.

Petitioners submit they are entitled to qualified immunity under this Court's existing jurisprudence. Nonetheless, as noted in their petition for writ of

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[1] Respondents also cite *United States v. Cazares-Olivas*, 515 F.3d 726, 729 (7th Cir. 2008), which incorrectly surmised that this Court would not have suppressed the evidence in *Groh* even though the officer was not immune. (Resp.Br.52 n.27.) *Groh*, 540 U.S. at 565 n.8, explicitly relied on *Leon*'s analysis in the suppression context, and observed that "'the same standard of objective reasonableness'" applied there "'defines . . . qualified immunity.'"

*United States v. Rosa*, 626 F.3d 56, 66 (2d Cir. 2010) (Resp.Br.52 n.27), actually supports petitioners' position. The court distinguished *Groh* and relied on both dissents to apply the good-faith exception where an overbroad warrant authorized a search of computer media identifying "criminal conduct," but the surrounding circumstances indicated the officers believed it authorized a search for evidence only of child pornography. 626 F.3d at 58, 64-66 & n.3.

certiorari and merits brief, and as review of the Ninth Circuit opinion reveals, courts plainly are having difficulty applying *Malley*'s "so lacking in indicia of probable-cause" standard in the context of both civil claims and suppression hearings in criminal cases. This, at the very least, warrants the Court taking a close look at *Malley*'s open-ended standard.

Respondents contend *stare decisis* precludes this Court from overruling its precedents, particularly where a statutory provision is involved. (Resp.Br.44-49.) Nonetheless, this Court has reconsidered prior decisions that have proved "unworkable" or "badly reasoned," *Arizona v. Gant*, 129 S.Ct. 1710, 1728 (2009), or have "defied consistent application by the lower courts," *Pearson*, 555 U.S. at 235 – particularly with respect to the procedural and substantive aspects of qualified immunity. *See id.* at 233-36 (overruling *Saucier v. Katz*, 553 U.S. 194 (2001)); *Harlow*, 457 U.S. at 815-19 (eliminating "subjective" element of qualified immunity). That is precisely the case here.

Petitioners suggested this Court consider whether the "so lacking in indicia of probable-cause" standard should be retained, since the burden it imposes on the judicial system by inviting endless relitigation of probable-cause determinations far outweighs any incremental benefit there may be in providing additional disincentive for officers to seek warrants without a proper basis – the primary disincentive being that magistrates generally reject inadequate

warrant applications. (Pet.Br.15-16, 37.) If officers are routinely submitting plainly inadequate warrants, the issue is inadequate training or supervision and correction is available via municipal liability under *Monell v. Dept. of Social Services*, 436 U.S. 658 (1978). However, imposing liability on officers for relying on a fully informed magistrate's independent, if ultimately erroneous, determination of probable cause does nothing to foster recourse to the warrant process in borderline cases, since the magistrate's decision affords the officer no additional protection. It is the officer's understanding of the law, and not the magistrate's, that ultimately determines liability.

Respondents argue that officers have many incentives to seek warrants because courts defer to a magistrate's probable-cause determination in close cases, and some warrantless searches are "presumptively unreasonable." (Resp.Br.47-48.) But under the "so lacking in indicia of probable-cause" standard, courts are *not* paying appropriate deference to warrants. They feel free to substitute their judgment for that of a magistrate, and find not simply a lack of probable cause, but that no reasonable officer (including, by implication, no reasonable judicial officer) could even entertain the possibility. To be sure, as respondents note, reasonable judges can be expected to disagree on close questions. Yet, *Malley* and *Leon* make it clear that qualified immunity is to be denied and evidence is to be suppressed only where the question is not even close, *i.e.*, where someone believing in probable cause could only be described as

plainly incompetent or knowingly violating the law. When judges disagree about so fundamental a question as probable cause, it is little consolation to an officer who is on the losing side of that legal debate that he is no more plainly incompetent nor knowingly violating the law than a learned judicial officer.

*Malley* and *Leon* afford redress where officers subvert the basic purpose of the warrant process by improperly manipulating the proceedings. Absent evidence of such conduct, officers should be insulated from liability for relying on an independent, albeit erroneous, determination of probable cause by a magistrate.

## CONCLUSION

Petitioners are entitled to qualified immunity. The Ninth Circuit's judgment should be reversed, with directions to vacate the district court's order insofar as it denies qualified immunity to petitioners, and to enter judgment for petitioners.

Respectfully submitted,

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# AMICUS CURIAE BRIEF

No. 10-704

# In the Supreme Court of the United States

CURT MESSERSCHMIDT, ET AL., PETITIONERS

*v.*

AUGUSTA MILLENDER, ET AL.

*ON WRIT OF CERTIORARI*
*TO THE UNITED STATES COURT OF APPEALS*
*FOR THE NINTH CIRCUIT*

## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS


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## QUESTION PRESENTED

Whether officers are entitled to qualified immunity for executing a facially valid warrant to search for all firearms and gang-related items at a suspect's residence, when the affidavit supporting the warrant established that the suspect had fired a sawed-off shotgun at his former girlfriend and was a known gang member, but a court concludes that the affidavit provided probable cause to seize only some but not all of the items the warrant covered.

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# In the Supreme Court of the United States

No. 10-704

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*v.*

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*ON WRIT OF CERTIORARI*
*TO THE UNITED STATES COURT OF APPEALS*
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## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

### INTEREST OF THE UNITED STATES

This case presents the question whether a law enforcement officer who executes a facially valid search warrant is entitled to qualified immunity in a damages action under 42 U.S.C. 1983 when the affidavit supporting the warrant provides probable cause for some but not all of the items the warrant authorized officers to seize. The Court's resolution of that question could affect federal officials' entitlement to qualified immunity in similar actions filed pursuant to *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). In addition, the Court's resolution of the question presented could affect the admissibility of evidence in federal criminal cases because this Court has held, in the context of warrant-authorized searches

and seizures, that "the same standard of objective reasonableness" governs both the good-faith exception to the exclusionary rule and the qualified immunity of officers. *Malley* v. *Briggs*, 475 U.S. 335, 344 (1986). The United States therefore has a substantial interest in the resolution of this case.

## STATEMENT

1. a. On October 17, 2003, Shelly Kelly was moving her belongings out of the apartment she shared with her boyfriend Jerry Bowen on West 97th Street in Los Angeles, California. Pet. App. 109. Because Bowen had a violent temper and had physically assaulted Kelly in the past, Kelly requested that officers of the Sheriff's Department accompany her while she moved out of the apartment. *Id.* at 109-110. Two deputies stood by while she moved; but after 20 minutes, they were called away to an emergency. *Id.* at 110. As soon as the deputies left the scene, Bowen appeared. He screamed, "I told you to never call the cops on me bitch," physically assaulted Kelly, and attempted to throw her over the railing of the second-story landing of the apartment building. *Id.* at 4. Bowen grabbed Kelly, bit her, and attempted to drag her by her hair into the apartment. Kelly resisted, bracing herself against the door frame. When Bowen grabbed both of Kelly's arms, she was able to escape by wriggling out of her shirt. Kelly ran to her car, pursued within seconds by Bowen, who was holding a "black sawed off shotgun with a pistol grip." Bowen stood in front of Kelly's car, pointed the shotgun at her, and yelled, "[i]f you try to leave, I'll kill you bitch." *Ibid.* Kelly laid down on the front seat of her car and floored the gas peddle. *Id.* at 4, 110. Bowen jumped out of the way and fired one shot at Kelly, blowing out the front

left tire of her car. *Id.* at 4. Kelly kept driving and Bowen fired four more times in Kelly's direction, missing each time. *Ibid.*

Kelly located police officers, who recognized her immediately as the woman they had been protecting earlier. Pet. App. 4. Kelly described Bowen's assault on her and provided the officers with four photographs of Bowen. *Id.* at 4-5. Petitioner Curt Messerschmidt was the detective assigned to the case. After reviewing the incident reports, he met with Kelly on October 22 to verify the facts. *Id.* at 111. Kelly stated that Bowen no longer lived at the 97th Street address they had shared, but was instead staying (or "hiding out") at a residence on East 120th Street in Los Angeles. *Id.* at 5, 109, 111. Messerschmidt showed a "six pack" of photographs to Kelly, and she identified Bowen. *Id.* at 5.

Messerschmidt conducted what he described in his warrant application affidavit as an "extensive background search" on Bowen using "departmental records, state computer records, and other police agency records." Pet. App. 5. Those records confirmed that Bowen resided at the 120th Street address. *Ibid.* Relying on his experience and information from both Kelly and the "cal-gang database," Messerschmidt also confirmed that Bowen was "a known Mona Park Crip gang member." *Id.* at 6; J.A. 58.

b. Messerschmidt prepared a warrant application, including supporting affidavits, seeking an arrest warrant for Bowen, a search warrant for the 120th Street address, and permission to execute the warrants at night because of safety concerns. Pet. App. 3-8. Messerschmidt sought a warrant to search for gun evidence, specifically:

> All handguns, rifles, or shotguns of any caliber, or any firearms capable of firing ammunition, or firearms or devices modified or designed to allow it to fire ammunition. All caliber of ammunition, miscellaneous gun parts, gun cleaning kits, holsters which could hold or have held any caliber handgun being sought. Any receipts or paperwork showing the purchase, ownership, or possession of the handguns being sought. Any firearm for which there is no proof of ownership. Any firearm capable of firing or chambered to fire any caliber ammunition.

Pet. App. 115; J.A. 52. He also sought permission to search for gang-affiliation and identity evidence, *i.e.*:

> Articles of evidence showing street gang membership or affiliation with any Street Gang to include but not limited to any reference to "Mona Park Crips", including writings or graffiti depicting gang membership, activity or identity. Articles of personal property tending to establish the identi[t]y of [the] person in control of the premise or premises. Any photographs or photograph albums depicting persons, vehicles, weapons or locations, which may appear relevant to gang membership, or which may depict the item being sought or believed to be evidence in the case being investigated on this warrant, or which may depict evidence of criminal activity. Additionally to include any gang indicia that would establish the persons being sought in this warrant, affiliation or membership with the "Mona Park Crips" street gang.

J.A. 52; see Pet. App. 115.

Messerschmidt prepared two affidavits. The first detailed his extensive experience as a police officer, in-

cluding the training he had obtained, as well as his experience working in a "specialized unit, investigating gang related crimes and arresting gang members for various violations of the law." J.A. 53-54; Pet. App. 7. He noted that he had "attended hundreds of hours of instruction on the dynamics of gangs and gang trends," had "received in excess of forty hours of training pertaining to gang-related crimes, to include but not limited to the investigation of gang related shootings," and had been involved in "hundreds of gang related incidents, contacts, and[/]or arrests." *Ibid.* The second affidavit recounted the October 13 incident between Bowen and Kelly as well as Messerschmidt's investigation of Bowen's background and gang ties. J.A. 55-59; Pet. App. 3-6.

In the course of investigating Bowen's background, Messerschmidt learned that Bowen had several felony convictions and misdemeanor arrests, was on probation for spousal battery and driving without a license, and was a "third strike" candidate under California law. Messerschmidt did not, however, include that information in his affidavits. Pet. App. 8.

Two of Messerschmidt's supervisors—including petitioner Sergeant Robert Lawrence—reviewed and approved the affidavits and warrant application. Pet. App. 114. A deputy district attorney, Janet Wilson, also reviewed the materials and put a notation on the warrant stating: "Reviewed for PC by DDA Janet Wilson, 11-4-03." J.A. 47; Pet. App. 9. Messerschmidt then presented the proposed warrants and affidavits to a magistrate judge, who approved the warrants and authorized night service. Pet. App. 9.

At approximately 5 a.m. on November 6, 2003, police officers served the warrants and searched the 120th

Street address. Pet. App. 9. Officers ordered the ten occupants of the house to exit, which they did. The occupants included respondents Augusta Millender, Brenda Millender (Augusta's daughter), and William Johnson (Brenda's son). *Ibid.* Petitioners were present when the search warrant was executed, but did not participate in the search. *Ibid.* Police found and seized Augusta Millender's personal shotgun, a box of .45-caliber ammunition, and a letter from Social Services addressed to Bowen. They did not find Bowen or the black sawed-off shotgun with a pistol grip that Kelly had described. *Id.* at 9-10, 109, 122.

2. Respondents filed suit under 42 U.S.C. 1983 against petitioners and others alleging, *inter alia*, violations of their Fourth Amendment rights. As relevant here, the district court determined that the search warrant violated the Fourth Amendment because Messerschmidt's affidavits did not provide probable cause to seize all firearm- and gang-related items, as authorized in the warrant. Pet. App. 152-169.[1] The court reasoned that the affidavit did not mention any guns other than the specific (and specifically described) gun used in the assault on Kelly, and it did not mention any crimes other than that assault. *Id.* at 157-158. The district court found that the warrant properly authorized seizure of evidence tending to establish who controlled the premises. *Id.* at 159.[2] In addition, the court held that the individual defendants were not entitled to qualified im-

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[1] The district court also determined that the warrant to arrest Bowen and the request for nighttime service were supported by probable cause. Pet. App. 131-136, 148-160, 170.

[2] The district court also found probable cause to search the 120th Street address. Pet. App. 158-159. That ruling was not contested on appeal. *Id.* at 27.

munity, noting that they had "made no additional arguments as to why, even if the warrant was overbroad, the officers acted reasonably, without knowing that what they were doing was wrong." *Id.* at 171.

3. A panel of the court of appeals reversed. See Pet. App. 79-105. "[A]ccepting, but not ruling on, the district court's determination that the warrant was overbroad," the panel concluded that petitioners were nonetheless entitled to qualified immunity. *Id.* at 94. The court held that the affidavit's statements that "Bowen had engaged in an assault with a deadly weapon" and "had ties with a gang" supported a reasonable inference that Bowen had a criminal record. *Id.* at 92 & n.5. Taking together the affidavit's explicit statements and the reasonable inferences that followed from them, the court concluded that "an officer may reasonably have thought that the warrant could include the search for, and seizure of, firearms other than the sawed-off shotgun, as well as evidence relating to gang affiliation." *Id.* at 92. The court further emphasized that petitioners "could reasonably have expected" the deputy district attorney and magistrate who reviewed the warrant and affidavit "to limit the warrant if it sought items for which there was no probable cause." *Id.* at 93.

4. a. The Ninth Circuit voted to rehear the case en banc, and an en banc panel of the court affirmed the district court's judgment. Pet. App. 1-76. A majority of the en banc panel agreed with the district court that the search warrant violated the Fourth Amendment because it was not supported by probable cause as to the firearms (other than the sawed-off shotgun used in the assault on Kelly) and the gang-related items. *Id.* at 12-29; see *id.* at 21 ("In short, the deputies had probable cause to search for a single, identified weapon, whether assem-

bled or disassembled. They had no probable cause to search for the broad class of firearms and firearm-related materials described in the warrant."); *id.* at 29 ("Because the deputies failed to establish any link between gang-related materials and a crime, the warrant authorizing the search and seizure of all gang-related evidence is likewise invalid."). The court held, therefore, that the warrant did not satisfy "the requirement that the scope of the warrant be limited by the probable cause on which the warrant is based." *Id.* at 13 (internal citations and quotation marks omitted); see *id.* at 16 (referring to the "rule that police must have probable cause for every item searched").

The en banc panel also denied petitioners qualified immunity. Pet. App. 29-38. The court determined that the warrant suffered from a "glaring deficiency" because neither it nor Messerschmidt's affidavits "established probable cause that the broad categories of firearms, firearms-related material, and gang-related material described in the warrant were contraband or evidence of a crime." *Id.* at 35. Based on its view that the warrant was "plainly invalid," the en banc panel majority concluded that no officer could "reasonably but mistakenly believe that the search warrant established a colorable argument for probable cause" to search for firearms beyond the sawed-off shotgun or for evidence of gang affiliation. *Id.* at 36 (internal citations and quotation marks omitted). The court rejected the contention that petitioners reasonably relied on the review of their superiors, a deputy district attorney, and a magistrate judge to detect defects in the warrant. *Ibid.* The court reasoned that petitioners "had a responsibility to exercise their reasonable professional judgment" and, under the circumstances of the case, "a neutral magis-

trate's approval (and, a fortiori, a non-neutral prosecutor's) cannot absolve an officer of liability." *Id.* at 37-38 (internal citation omitted).

b. Three judges dissented from the en banc ruling. Judge Callahan, joined by Judge Tallman, would have held that the affidavit supported probable cause to search for all firearms and firearm-related items. Pet. App. 39-45. Judge Callahan also would have held that, to the extent the warrant was overbroad, petitioners are entitled to qualified immunity. *Id.* at 60-70. Considering the totality of the circumstances, she concluded, petitioners were not "plainly incompetent" and did not "knowingly violate the law." *Id.* at 70 (citing *Malley*, 475 U.S. at 341).

Judge Silverman, also joined by Judge Tallman, would have held that "[t]he judge issued a defective warrant and the deputies mistakenly relied on it, but their mistake was entirely in good faith." Pet. App. 74. Judge Silverman noted that "[t]he record is totally devoid of any evidence that the deputies acted other than in good faith," and he would have held that petitioners could not be deemed to be plainly incompetent or to have knowingly violated the law by relying on a judge-signed warrant authorizing seizure of all guns and gang paraphernalia. *Id.* at 74-75.

## SUMMARY OF ARGUMENT

The court of appeals erred in denying petitioners qualified immunity for their role in the execution of a search warrant at respondents' home. A police officer is entitled to qualified immunity when executing a search warrant unless "no reasonably competent officer" would have relied on the magistrate's independent determination that the warrant was supported by probable cause.

*Malley* v. *Briggs*, 475 U.S. 335, 341 (1986). Here, petitioners had a reasonable basis for relying on the magistrate's finding of probable cause to search for firearms, firearm-related items, and gang-related material.

The affidavits submitted with the warrant application established that suspect Bowen had a history of physically assaulting his girlfriend, had fired a sawed-off shotgun at her in public in the middle of the day, and was a known member of a dangerous gang. The magistrate could have inferred from Bowen's violent history and gang ties that Bowen had a serious criminal history, which would make his possession of any firearm a crime. The magistrate could also authorize a search for gang-related material as evidence of Bowen's identity, his connection to the residence, and his tie to any evidence of criminal wrongdoing found in the residence. Whether or not a reviewing court would find adequate probable cause to search for these materials, competent law enforcement officers could reasonably rely on the magistrate's judgment in these respects.

The reasonableness of petitioners' reliance on the warrant and supporting affidavit should be judged by objective indicia of good faith. Those indicia demonstrate that petitioners did not know, and could not properly be charged with knowing, that the warrant was constitutionally lacking. The warrant itself was adequate on its face. The underlying affidavit was not the type of "bare bones" affidavit that would prevent a magistrate from making a neutral assessment of the existence of probable cause. And, to ensure the adequacy of the warrant application, petitioners submitted the warrant and affidavit to police supervisors and a deputy district attorney before submitting it to the magistrate. Messerschmidt's good faith is further confirmed by his

knowledge of Bowen's criminal history—knowledge that, although inadvertently omitted from the affidavit, would have put beyond debate the question of the existence of probable cause to search for all firearms. Finally, petitioners were executing not only a search warrant, but also a warrant to arrest an armed and dangerous person. Petitioners could have believed in good faith that a search of the premises for firearms was necessary to protect their safety in the process of seeking and apprehending Bowen or to protect Kelly's safety in the event they did not find him.

The Ninth Circuit purported to conduct a separate qualified-immunity analysis but in the end it denied qualified immunity based on nothing more than its conclusion that the warrant was not justified by probable cause. But an officer is entitled to immunity unless it was clearly established that his actions would violate the law. It is not enough to say that it was clearly established that the Fourth Amendment requires that the scope of the items authorized to be seized in a search warrant is supported by probable cause that the items are contraband or evidence of a crime. That is too high a level of generality for locating clearly established law. Petitioners should be immune unless it was clearly established that it would be a violation to execute a warrant in the circumstances presented here. The court of appeals identified no case with similar facts establishing that proposition, and it should not have denied petitioners immunity without doing so.

The court of appeals' undue restrictions on qualified immunity will chill police officers from performing important duties. But one purpose of qualified immunity is to protect officers' execution of their important functions by removing the fear of personal damages liability

for reasonable mistakes. And to the extent that personal liability, like the exclusionary rule, is designed to have a deterrent effect, the court of appeals' approach will reach much police conduct that is neither culpable nor grossly reckless and thus not amenable to appreciable deterrence. "As the qualified immunity defense has evolved, it provides ample protection to all but the plainly incompetent or those who knowingly violate the law." *Malley*, 475 U.S. at 341. Petitioners were not plainly incompetent and did not knowingly or intentionally violate the law. They should not be subject to a suit for damages in their personal capacity for a mistake (if any) that was the magistrate's, not theirs.

## ARGUMENT

### PETITIONERS ARE ENTITLED TO QUALIFIED IMMUNITY FOR EXECUTING A SEARCH WARRANT AT RESPONDENTS' RESIDENCE BECAUSE THEY REASONABLY RELIED ON THE WARRANT ISSUED BY A NEUTRAL MAGISTRATE

"Qualified immunity shields federal and state officials from money damages unless a plaintiff pleads facts showing (1) that the official violated a statutory or constitutional right, and (2) that the right was 'clearly established' at the time of the challenged conduct." *Ashcroft* v. *al-Kidd*, 131 S. Ct. 2074, 2080 (2011) (quoting *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982)). A court has discretion to determine whether an officer is entitled to qualified immunity without first determining whether there was a constitutional violation in a particular case. See *Pearson* v. *Callahan*, 555 U.S. 223, 236 (2009); see also *al-Kidd*, 131 S. Ct. at 2080 (rule permitting reviewing courts to exercise discretion to review either or both prongs of qualified-immunity analysis serves in part to

"ensure[] that courts do not * * * inadvertently undermine the values qualified immunity seeks to promote"). Although petitioners challenged both the constitutional ruling and the qualified-immunity ruling in the district court and court of appeals, the petition for a writ of certiorari presents only the qualified-immunity question. See Pet. i (asking whether officers are entitled to qualified immunity for "procur[ing] and execut[ing] warrants later determined invalid"). Petitioners are correct that the court of appeals erred in denying them qualified immunity.

### A. Petitioners Reasonably Relied On The Magistrate's Issuance Of The Search Warrant Based On The Supporting Affidavits They Submitted

1. "The basic purpose of [the Fourth] Amendment * * * is to safeguard the privacy and security of individuals against arbitrary invasions by government officials." *Camara* v. *Municipal Court*, 387 U.S. 523, 528 (1967). The Amendment accomplishes that goal by requiring that searches be reasonable, a standard that necessarily turns on "the facts of the case." *Terry* v. *Ohio*, 392 U.S. 1, 15 (1968). In many situations, a search or arrest is reasonable even in the absence of a warrant. See, *e.g.*, *Brigham City, Utah* v. *Stuart*, 547 U.S. 398 (2006); *Michigan* v. *Long*, 463 U.S. 1032 (1983); *United States* v. *Ross*, 456 U.S. 798 (1982); *United States* v. *Watson*, 423 U.S. 411 (1976). But especially concerning searches of the home, this Court has "expressed a strong preference for warrants." *United States* v. *Leon*, 468 U.S. 897, 914 (1984). The central function of the Fourth Amendment's Warrant Clause is to "circumscribe[]" "the discretion of the official in the field." *Camara*, 387 U.S. at 532. As the Court has explained in

the context of the search of a home, "a search warrant provides the detached scrutiny of a neutral magistrate, which is a more reliable safeguard against improper searches than the hurried judgment of a law enforcement officer engaged in the often competitive enterprise of ferreting out crime." *Leon*, 468 U.S. at 913-914 (internal quotation marks omitted).

The Warrant Clause requires that a search be supported by "probable cause," a standard that must be applied with a "totality-of-the-circumstances approach" that is "practical" and "nontechnical." *Illinois* v. *Gates*, 462 U.S. 213, 230-231 (1983). "[A]s the very name implies," "probable cause is a fluid concept—turning on the assessment of probabilities in particular factual contexts—not readily, or even usefully, reduced to a neat set of legal rules." *Id.* at 231, 232. In order to conclude that probable cause exists, a magistrate need find "only the probability, and not a prima facie showing, of criminal activity." *Id.* at 235; see *Maryland* v. *Pringle*, 540 U.S. 366, 371 (2003) ("preponderance of the evidence" test "ha[s] no place in the [probable-cause] decision") (quoting *Gates*, 462 U.S. at 235) (second brackets added by Court); *Texas* v. *Brown*, 460 U.S. 730, 742 (1983) (plurality opinion) (finding of probable cause "does not demand any showing that such a belief be correct or more likely true than false"); Thomas K. Clancy, *The Fourth Amendment: Its History and Interpretation* 477 (2008) (noting that probable cause standard is less stringent than a more-likely-than-not standard).

2. When a court determines that a search conducted pursuant to a warrant violated the Fourth Amendment because the warrant was not supported by probable cause, the court must then determine whether a judicial remedy (exclusion from a criminal trial of the evidence

obtained pursuant to the warrant or money damages against the proper officials) is appropriate. In *Leon*, the Court created a "good faith exception" to the exclusionary rule remedy that this Court has fashioned, *i.e.*, that evidence obtained in violation of the Fourth Amendment should be suppressed in a criminal trial. *Leon* held that "the Fourth Amendment exclusionary rule should be modified so as not to bar the use in the prosecution's case in chief of evidence obtained by officers acting in reasonable reliance on a search warrant issued by a detached and neutral magistrate but ultimately found to be unsupported by probable cause." 468 U.S. at 900. Two years later, the Court made clear that the same reasonableness standard governs the question whether an officer who executed an arrest or search warrant later determined not to be supported by probable cause is entitled to qualified immunity. *Malley* v. *Briggs*, 475 U.S. 335, 344 & n.6 (1986); see *Groh* v. *Ramirez*, 540 U.S. 551, 565 n.8 (2004).[3]

In both contexts, an officer's reliance on a magistrate's decision to issue a warrant must be objectively reasonable. *Leon*, 468 U.S. at 922. But the Court has been careful to note that "[s]earches pursuant to a warrant will rarely require any deep inquiry into reasonableness" because "'a warrant issued by a magistrate normally suffices to establish' that a law enforcement

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[3] The Court should reject respondents' invitation (Resp. Br. in Opp. 32-34) to overrule decades of precedent holding that the reasonableness standard governing the good-faith exception to the exclusionary rule in the context of warrant-authorized searches and seizures is the same as the test governing qualified immunity for Fourth Amendment violations. Because both doctrines aim to deter the same unconstitutional conduct without unduly infringing on competing interests, the same standard should apply in both contexts.

officer has 'acted in good faith in conducting the search." *Id.* at 922 (quoting *Gates*, 462 U.S. at 267 (White, J., concurring in judgment), and *Ross*, 456 U.S. at 823 n.32).

The Court has identified four situations in which reliance on a warrant is not objectively reasonable: (1) when the magistrate issuing the warrant is misled by information in an affidavit that the affiant knew or should have known was false; (2) when the magistrate wholly abandons the role of neutral arbiter and rubberstamps a warrant application; (3) when an affidavit supporting a warrant is "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable"; and (4) when the warrant is facially deficient, such as by failing to identify the place to search, the items to seize, or the individual to arrest. *Leon*, 468 U.S. at 923 (citation omitted). The question in this case is whether the third category applies, *i.e.*, whether "the warrant application [was] so lacking in indicia of probable cause as to render official belief in its existence unreasonable." *Malley*, 475 U.S. at 344-345. Applying that standard, courts should find immunity unless, "on an objective basis, it is obvious that no reasonably competent officer would have concluded that a warrant should issue; but if officers of reasonable competence could disagree on this issue, immunity should be recognized." *Malley*, 475 U.S. at 341.

3. As the Court explained in *Leon*, "[r]easonable minds frequently may differ on the question whether a particular affidavit establishes probable cause." 468 U.S. at 914. The Court has therefore emphasized "that the preference for warrants is most appropriately effectuated by according 'great deference' to a magistrate's determination." *Ibid.* (quoting *Spinelli* v. *United States*, 393 U.S. 410, 419 (1969)). Accordingly, in close cases, a

search under warrant may be found valid even if a warrantless search on the same facts "would fall." *Ibid.*

The standard for finding objective good faith or qualified immunity requires even greater latitude for reasonable differences in judgment. Even when a reviewing court cannot find a "substantial basis for determining the existence of probable cause," *Leon*, 468 U.S. at 915 (quoting *Gates*, 462 U.S. at 239), a reasonable officer can still, in all but the most extraordinary cases, rely in objective good faith on the judgment of a neutral magistrate that the basis for suspicion is adequate to support the scope of the warrant. "Judges and magistrates are not adjuncts to the law enforcement team; as neutral judicial officers, they have no stake in the outcome of particular criminal prosecutions." *Id.* at 917. Accordingly, officers can legitimately conclude that it is reasonable to trust the magistrate's judgment that a search is permissible absent clear-cut indications that it is not.

Here, petitioners were objectively reasonable in relying on the magistrate's determination that probable cause justified a search for firearms, firearm-related material, and gang-related material.[4] The warrant described with particularity the place to be searched and the items to seize, and it was therefore not facially deficient. And respondents have not alleged either that petitioners intentionally or recklessly supplied the magis-

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[4] It is no longer in dispute, see Pet. App. 60, that there was probable cause to search the 120th Street address. Bowen's recent live-in girlfriend had provided that address to Messerschmidt as Bowen's current address, and Messerschmidt had independently confirmed through law enforcement databases that Bowen had a connection to that address. *Id.* at 5. That was sufficient to establish probable cause to believe that police would find Bowen and his possessions at respondents' residence.

trate with false information or that the magistrate abdicated his role by rubber-stamping the warrant application.

The warrant application also contained sufficient information to justify a reasonable, even if mistaken, belief that probable cause supported the scope of the warrant. Contrary to the Ninth Circuit's view, petitioners reasonably could have believed that the affidavit established probable cause to search for all firearms (and related items) based on the facts alleged in the affidavits and inferences the magistrate could permissibly draw from those facts. It is undisputed, see Pet. App. 15, that there was probable cause to search for the black sawed-off shotgun Bowen allegedly fired five times at Kelly; that shotgun was evidence of the crime of assault with a dangerous weapon. It was also very likely to be evidence of illegal possession of an unregistered sawed-off shotgun. As one court of appeals has stated, "courts have found that, because of the very nature of the object and the fact that so few sawed-off shotguns are actually registered, just witnessing someone in possession of such a weapon provides probable cause that the firearm is unregistered." *United States* v. *Decoteau*, 932 F.2d 1205, 1207 n.* (7th Cir. 1991); see, *e.g.*, *United States* v. *Melvin*, 596 F.2d 492, 500-501 (1st Cir.), cert. denied, 444 U.S. 837 (1979); *United States* v. *Story*, 463 F.2d 326, 328 (8th Cir.), cert. denied, 409 U.S. 988 (1972); *Porter* v. *United States*, 335 F.2d 602, 607 (9th Cir. 1964), cert. denied, 379 U.S. 983 (1965).

But the officers could also reasonably believe that, in light of Bowen's history of violence, other weapons would be evidence of criminal conduct as well. Messerschmidt had discovered through his investigation that Bowen had several felony convictions—and that posses-

sion by Bowen of any firearm was therefore evidence of a crime. Although Messerschmidt did not state in the affidavits he submitted with the warrant application that Bowen had multiple felony convictions, the affidavits contained sufficient information for the magistrate to infer that Bowen had such a criminal history. Messerschmidt's first affidavit set out in detail his work and training history as a law enforcement officer, much of which was specifically related to gang activity. J.A. 53-54. His second affidavit set forth details of Bowen's assault and attempted shooting of Kelly; explained that Messerschmidt had "conducted an extensive background search on [Bowen] by utilizing departmental records, state computer records, and other police agency records"; and stated that Bowen was "a known Mona Park Crip gang member." J.A. 55-59.

Taken together, the information in the affidavits was sufficient for the magistrate to infer that Bowen had a criminal background, making his possession of firearms illegal. That would provide probable cause to search for any firearms and firearm-related items at the home where officers reasonably believed Bowen to be residing. Probable cause may be based on reasonable inferences drawn from facts stated in an affidavit, and a magistrate is free "to draw such reasonable inferences as he will from the material supplied to him by applicants for a warrant." *Gates*, 462 U.S. at 240. As two dissenting court of appeals judges concluded in this case, "there was at least a 'fair probability' not only that there might be firearms in the house in which Bowen was believed to be residing, but that such firearms would be 'contraband or evidence of a crime.'" Pet. App. 42 (Callahan, J., dissenting, joined by Tallman, J.) (quoting *Gates*, 462 U.S. at 238). It is reasonable to assume that the magistrate

appropriately performed his assigned task by "mak[ing] a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, * * * there [was] a fair probability that contraband or evidence of a crime [would] be found in a particular place." *Gates*, 462 U.S. at 238; see *United States* v. *Grubbs*, 547 U.S. 90, 95 (2006). Even if the facts alleged in the affidavits, combined with the reasonable inferences that followed from the facts, did not establish probable cause, a reasonably competent officer would have had a reasonable basis for believing that they did. Such a belief need not have been correct to entitle petitioners to qualified immunity, see *al-Kidd*, 131 S. Ct. at 2085; it need only have been *not* "entirely unreasonable," *Leon*, 468 U.S. at 923.

Petitioners also reasonably could have believed that the affidavits established probable cause to search for gang-related items, at least as part of a search for identity information. In the section listing the gang-related items to be seized, the warrant authorized officers to search for "any gang indicia that would establish the persons being sought in this warrant" and for "[a]rticles of personal property tending to establish the identity of [the] person in control of the premise or premises." J.A. 52. The warrant thereby made clear that evidence of Bowen's gang affiliation was relevant to establishing Bowen's identity in the event of his arrest, to showing that he resided at the 120th Street address, and to establishing that any contraband seized under the warrant was contraband in Bowen's possession. Regardless of whether the affidavits and warrant were in fact sufficient to establish probable cause to search for all gang-related items, petitioners are entitled to qualified immunity because their "official belief" in the existence of

probable cause to seize the items listed in the warrant was not "entirely unreasonable." *Leon*, 468 U.S. at 923 (internal quotation marks and citation omitted).[5]

4. As petitioner notes (Br. 36-38), some courts of appeals have been too quick to conclude that an officer's reliance on a magistrate's issuance of a warrant was unreasonable because the warrant affidavit was "so lacking in indicia of probable cause." It merits emphasis, therefore, that such an assessment should take into account objective indicia of good faith on the officer's part. See *Herring* v. *United States*, 555 U.S. 135, 143 (2009) (noting that, in applying the good-faith exception to the exclusionary rule, "evidence should be suppressed only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment") (quoting *Illinois* v. *Krull*, 480 U.S. 340, 348-349 (1987)) (internal quotation marks omitted).

Nothing on the face of the warrant or the supporting affidavit would have given petitioners reason to doubt the warrant's validity. The warrant described in sufficient detail the place to search and the items to seize. And the affidavit was not the type of "bare bones" affidavit that would prevent the magistrate from making a neutral and detached determination about the existence of probable cause to support the search. See *Leon*, 468 U.S. at 914-915. On the contrary, the affidavit contained a detailed account of Bowen's violent attack on Kelly as

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[5] In addition, to the extent the warrant's authorization to search for any firearms or firearm-related items was supported by probable cause, its authorization to search for gang-related items neither expanded the scope of the areas to be searched nor resulted in the seizure of any item.

well as information about his violent past and his gang ties. J.A. 55-59.

Petitioners' efforts to obtain approval of the warrant application from supervisors and a deputy district attorney further confirms their good faith. Although members of the prosecution team do not neutrally assess probable cause in the way that a magistrate does, they have no incentive to seek or execute a warrant that is not supported by probable cause. Petitioners' reliance on the collective judgment of different officers and a prosecuting attorney objectively indicates that they were attempting to follow the law and that they are therefore entitled to qualified immunity. See, *e.g.*, *Massachusetts* v. *Sheppard*, 468 U.S. 981, 989 (1984) (good-faith exception applies when officer had district attorney approve affidavit); *United States* v. *Capozzi*, 347 F.3d 327, 334 (1st Cir. 2003) (good-faith exception applies in part because officer sought advice of an assistant district attorney before submitting warrant application), cert. denied, 540 U.S. 1168 (2004); *Gomez* v. *Atkins*, 296 F.3d 253, 264 (4th Cir. 2002) (qualified immunity appropriate in part because officer "conducted himself, from a procedural standpoint, in a prudent and deliberate manner" in seeking search warrant by having warrant application reviewed by supervisors and legal advisor before submitting it to the magistrate), cert. denied, 537 U.S. 1159 (2003); *United States* v. *Freitas*, 856 F.2d 1425, 1431 (9th Cir. 1988) (good-faith exception applies in part because officers sought advice of Assistant United States Attorney before submitting warrant application to magistrate).

The court of appeals refused to consider Messerschmidt's knowledge of Bowen's criminal history because Messerschmidt failed to include that information

in the warrant application. But that knowledge is a further indication that Messerschmidt's reliance on the warrant was objectively reasonable. Respondents do not allege that Messerschmidt intentionally omitted the information from his affidavit—indeed, he had no reason to do so as the information was helpful to his cause. In considering the totality of the circumstances bearing on the objective reasonableness of the officers' actions, the court of appeals should have credited Messerschmidt's knowledge of Bowen's criminal history even though Messerschmidt inadvertently omitted that information from the warrant application. See, *e.g.*, *United States* v. *Clay*, No. 11–1177, 2011 WL 3188996, at *2 (8th Cir. July 28, 2011) (noting that a district court "must consider totality of circumstances, including information not presented to the judge issuing the search warrant but known to the police officers"); *United States* v. *Martin*, 297 F.3d 1308, 1319-1320 (11th Cir.) (in making good-faith determination, court considered information known to officer but not included in affidavit, noting that "a majority of circuits have taken into consideration facts outside the affidavit when determining whether the *Leon* good faith exception applies"), cert. denied, 537 U.S. 1076 (2002); *United States* v. *Bynum*, 293 F.3d 192, 198-199 (4th Cir. 2002) ("[A] court should not refuse to apply the *Leon* good faith exception just because the officer fails to include in [an affidavit supporting a warrant application] all of the information known to him *supporting* a finding of probable cause."); see also *Groh*, 540 U.S. at 566-567 (Kennedy, J., dissenting) (noting that qualified immunity applies when officer makes a mistake "regardless of whether the officer's error is a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact").

Finally, it is undisputed that probable cause existed to arrest Bowen for violent acts—and that the magistrate's authorization of nighttime service of the warrant was justified by safety concerns. Petitioners had evidence that Bowen was armed and dangerous, had a history of violence, had both threatened to kill and attempted to kill Kelly, and was a member of a notorious gang. Given the danger involved in executing the arrest warrant, as well as the potential lingering danger to Kelly, petitioners reasonably could have believed that a search of the premises for firearms was justified to protect their safety incident to the process of searching for and ultimately seizing Bowen or to remove threats to Kelly in the event they could not locate Bowen. Cf. *Maryland* v. *Buie*, 494 U.S. 325, 327 (1990) (protective sweep of premises incident to in-home arrest permissible based on reasonable suspicion that swept area harbored dangerous individuals); *Chimel* v. *California*, 395 U.S. 752, 762-764 (1969) (search of areas immediately accessible to arrestee is permissible to remove dangerous weapons).

### B. The Ninth Circuit's Erroneous Decision Undermines Legitimate Law Enforcement Efforts And Is Unsuited To Deter Unlawful Government Action

The court of appeals' refusal to grant petitioners qualified immunity left insufficient daylight between its determination that the search warrant was not supported by probable cause and its consideration of whether petitioners reasonably believed that it was. Officers executing a warrant are entitled to qualified immunity unless their actions are objectively unreasonable as measured by reference to clearly established law. *Harlow*, 457 U.S. at 818. That standard strikes the

right balance between deterring officer misconduct and allowing officers to exercise their functions with appropriate independence and vigor. *Malley*, 475 U.S. at 343; *Harlow*, 457 U.S. at 818-819; see *Pearson*, 555 U.S. at 231 ("Qualified immunity balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably."). But law cannot be clearly established in the context of probable-cause determinations absent either case law particularizing Fourth Amendment requirements on closely analogous facts or a glaring gap between the facts in the affidavit and the scope of the warrant. The Ninth Circuit conducted the qualified immunity inquiry at too high a level of generality—an approach that will undermine, rather than advance, the purposes of that doctrine.

1. The court of appeals' strict interpretation of *Malley*'s objectively-reasonable standard will chill officers' legitimate exercise of their official duties. As this Court recently reiterated, "[q]ualified immunity gives government officials breathing room to make reasonable but mistaken judgments about open legal questions." *al-Kidd*, 131 S. Ct. at 2085; *Saucier* v. *Katz*, 533 U.S. 194, 205 (2001) ("If the officer's mistake as to what the law requires is reasonable, * * * the officer is entitled to the immunity defense."); *Malley*, 475 U.S. at 343 (qualified immunity "gives ample room for mistaken judgments"). Holding officers personally liable for money damages for executing a search warrant that they reasonably but mistakenly believed to be based on probable cause puts officers in a deeply unfair situation. It is not reasonable to expect an individual law enforce-

ment officer to be more skilled at interpreting relevant case law than a magistrate judge issuing a search warrant. If an officer is to be denied qualified immunity, it ordinarily must be because existing law clearly dictated that, in the factual situation the officer confronted, no reasonable official would have believed that probable cause supported the search warrant.

At the time the search warrant in this case was executed, it was no doubt clearly established that individuals have a right under the Fourth Amendment not to have their home searched pursuant to a warrant (when one is required) that is not supported by probable cause. But that is not the question a court should ask in deciding whether an officer who executes such a warrant is entitled to qualified immunity. A court must ask whether it was clearly established that, under the facts of a particular case or a closely analogous set of facts, it was unreasonable for an officer to believe that a warrant was supported by probable cause. See *Wilson* v. *Layne*, 526 U.S. 603, 615 (1999); *Anderson* v. *Creighton*, 483 U.S. 635, 639 (1987). As this Court recently explained in *al-Kidd*:

> We have repeatedly told courts—and the Ninth Circuit in particular—not to define clearly established law at a high level of generality. The general proposition, for example, that an unreasonable search or seizure violates the Fourth Amendment is of little help in determining whether the violative nature of particular conduct is clearly established.

131 S. Ct. at 2084 (internal citations omitted). In this context, an officer is entitled to qualified immunity unless "every 'reasonable official would have understood that what he is doing violates [a clearly established]

right.'" *Id.* at 2083 (quoting *Anderson*, 483 U.S. at 640). To be sure, a controlling case presenting exactly the same factual scenario is not always necessary in order for the law to be clearly established. For example, if the warrant in this case had authorized a search for stolen vehicles or drugs, the gap between the facts alleged in the affidavit and the scope of the warrant would be so obvious that any reasonable officer should have perceived it. But in the ordinary case, "existing precedent must have placed the statutory or constitutional question beyond debate." *Ibid.*

It is particularly important in the Fourth Amendment context that courts be able to identify cases presenting closely analogous factual scenarios before denying police officers qualified immunity. As this Court has noted, "translation of the abstract prohibition against 'unreasonable searches and seizures' into workable guidelines for the decision of particular cases is a difficult task." *Camara*, 387 U.S. at 528. In part for that reason, this Court has directed appellate courts to conduct independent review of "ultimate determinations of reasonable suspicion and probable cause." *Ornelas* v. *United States*, 517 U.S. 690, 697 (1996). Such rules "acquire content only through application," *ibid.*, and thus *de novo* review "potentially may guide police, unify precedent, and stabilize the law," *Id.* at 698 (quoting *Thompson* v. *Keohane*, 516 U.S 99, 115 (1995)).

The Court has also recognized that, because probable-cause determinations depend on particular constellations of facts, "one determination will seldom be a useful 'precedent' for another." *Ornelas*, 517 U.S. at 698 (quoting *Gates*, 462 U.S. at 238 n.11). That point has particular resonance here. The court of appeals identified *no* case with analogous facts that would have put

petitioners on notice that the search warrant was not supported by probable cause. Instead, the court of appeals relied almost exclusively (see Pet. App. 35-36) on this Court's decision in *Groh*. Although the Court in *Groh* upheld a denial of qualified immunity for execution of a deficient search warrant, that case was so different from this case that it cannot be said to clearly establish that petitioners' reliance on the search warrant in this case was objectively unreasonable. In particular, the court of appeals' assertion (Pet. App. 32) that "*Groh* offers an example of one of the rare cases described in *Malley* when a warrant is 'so lacking in indicia of probable cause as to render official belief in its existence unreasonable'" is simply incorrect. The Court in *Groh* held that officers were objectively unreasonable in executing a search warrant that was "plainly invalid" on its face because it "did not describe the items to be seized *at all*." 540 U.S. at 558. But the Court agreed that the warrant in that case "was based on probable cause." *Id.* at 557.

The warrant's deficiency in *Groh* thus differed in kind from the alleged flaws in the warrant here. In *Groh*, the Court concluded that the warrant's deficiency was a total failure to comply with the Fourth Amendment's requirement that a warrant "particularize the * * * things to be seized." 540 U.S. at 565. That failure was so glaring that any reasonable officer who merely read—indeed gave "a simple glance" to—the warrant would have realized that it was facially deficient. *Id.* at 564. But a mere "glance" at the search warrant here, or even careful study, would have revealed no flaw at all. The inadequacy found by the court of appeals was not a violation of the Particularity Clause; it instead depended on comparing the scope of the warrant

to the affidavits' supporting facts and the reasonable inferences that could be drawn from those facts. The officers would then have had to judge under the totality of the circumstances whether such facts and inferences together established probable cause, giving deference to the magistrate's determination. If petitioners doubted that probable cause existed, they would have had to believe their own judgment on the matter to be superior to that of their supervisors, a deputy district attorney, and the magistrate. Cf. *Sheppard*, 468 U.S. at 989-990 ("[W]e refuse to rule that an officer is required to disbelieve a judge who has just advised him, by word and by action, that the warrant he possesses authorizes him to conduct the search he has requested."). It is certainly true that some affidavits will be so obviously lacking in any indicia of probable cause as to require officers to make such a judgment, but the decision in *Groh* provides officers with no guidance about when that will be the case.

In passing, the court of appeals cited three cases in which the Ninth Circuit found that the breadth of the relevant search warrant was not supported by probable cause. See Pet. App. 35-36 (citing *United States* v. *SDI Future Health, Inc.*, 568 F.3d 684, 702-703 (2009); *In re Grand Jury Subpoenas*, 926 F.2d 847, 857 (1991); *VonderAhe* v. *Howland*, 508 F.2d 364, 369-370 (1975)). But all of those cases involved warrants authorizing officers to search for business documents rather than firearms, firearm-related items, or gang-related material. And none posed the question whether there was probable cause to search for all firearms or gang-related items when executing a search warrant in conjunction with a valid arrest warrant for an individual officers knew to be dangerous, in possession of a likely illegal

firearm, and a member of a gang—or any situation even arguably analogous. Although each case reiterates in some form the general rule that the full breadth of a warrant must be supported by probable cause, that broad constitutional principle does little to put officers on notice of its contours. See *Anderson*, 483 U.S. at 641 ("It simply does not follow immediately from the conclusion that it was firmly established that warrantless searches not supported by probable cause and exigent circumstances violate the Fourth Amendment that Anderson's search was objectively legally unreasonable."); Pet. App. 65 (Callahan, J., dissenting) ("I can find no clear precedent that supports the majority's conclusion.").

The court of appeals' error in concluding that petitioners violated clearly established law is made more apparent by the differing opinions among the court of appeals judges themselves as to whether petitioners acted reasonably in relying on the warrants. Compare Pet. App. 30-39 (en banc panel majority) with *id.* at 60-70 (Callahan, J., dissenting), 73-76 (Silverman, J., dissenting). As was true in *Leon*, "the opinions of the divided panel of the Court of Appeals ma[d]e clear" that the affidavit "provided evidence sufficient to create disagreement among thoughtful and competent judges as to the existence of probable cause." 468 U.S. at 926. It follows that qualified immunity for the officers is therefore appropriate.[6] "[I]f judges thus disagree on a

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[6] Decisions from other courts of appeals also make clear that petitioners' execution of the search warrant did not violate clearly established law. See, *e.g.*, *United States* v. *Sanders*, 351 Fed. Appx. 137, 139 (7th Cir. 2009) (search warrant for "all firearms" supported by probable cause when officers had reason to search for a specific firearm and defendant was convicted felon); *United States* v. *Guzman*, 507 F.3d

constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy." *Pearson*, 555 U.S. at 245 (quoting *Wilson*, 526 U.S. at 618).

2. To the extent that denial of qualified immunity from damages is designed to deter official misconduct, see *Memphis Cmty. Sch. Dist.* v. *Stachura*, 477 U.S. 299, 307 (1986) (Section 1983, as a tort remedy, serves the "important purpose" of "[d]eterrence" through "the mechanism of damages that are *compensatory*"); *Carlson* v. *Green*, 446 U.S. 14, 21 (1980) ("[T]he *Bivens* remedy, in addition to compensating victims, serves a deterrent purpose."), the court of appeals' approach will reach far more police conduct than is appropriate for that purpose. This Court recently explained that, in the criminal context, "the deterrence benefits of exclusion 'var[y] with the culpability of the law enforcement conduct' at issue." *Davis* v. *United States*, 131 S. Ct. 2419, 2427 (2011) (alteration in original) (quoting *Herring*, 555 U.S. at 143). The same is true with respect to the deterrence benefits of denying immunity in the civil context. In either case, deterrence is "strong and tends to outweigh the resulting costs" only "[w]hen the police exhibit 'delib-

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681, 683-686 (8th Cir. 2007) (upholding district court's conclusion that good-faith exception applied when officers executed search warrant for "all firearms located in" a house after suspect's girlfriend reported domestic violence incidents including threats with specific firearms); *United States* v. *Smith*, 62 Fed. Appx. 419, 421-422 (3d Cir. 2003) (warrant to search for "any ammunition and firearms" supported by probable cause when defendant was suspected of stealing specific handgun and had a felony record); see also *Muehler* v. *Mena*, 544 U.S. 93, 95 (2005) (officers obtained warrant to search for deadly weapons and evidence of gang membership based on evidence that one occupant of house was suspected to be an armed and dangerous gang member).

erate,' 'reckless,' or 'grossly negligent' disregard for Fourth Amendment rights." *Ibid.*[7]

In this case, petitioner Messerschmidt prepared detailed affidavits describing both his experience as a law enforcement officer and the evidence he had unearthed in his investigation of Bowen; he then submitted the affidavits and warrant application to two of his supervisors, including petitioner Lawrence, for review; when his supervisors cleared the application packet, Messerschmidt submitted it to a deputy district attorney, who approved it and noted on its face that she had reviewed it for probable cause; finally, Messerschmidt submitted the application to a neutral magistrate, who reviewed the packet, found probable cause to search the identified premises for the identified items, and signed the warrant. Thus, "[t]he officers in this case took every step that could reasonably be expected of them." *Sheppard*, 468 U.S. at 989. As this Court has made clear, "[i]t is the magistrate's responsibility to determine whether the officer's allegations establish probable cause and, if so, to issue a warrant comporting in form with the requirements of the Fourth Amendment." *Leon*, 468 U.S. at 921. When, as in this case, a magistrate did that, "there is literally nothing more the policeman can do in seeking to comply with the law." *Stone* v. *Powell*, 428 U.S. 465, 498 (1976) (Burger, C.J., concurring). "Penalizing [petitioners] for the magistrate's error, rather than [their] own, cannot

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[7] Deterrence, moreover, is the exclusive purpose of the exclusionary rule, *Herring*, 555 U.S. at 141, and the "basic insight" underlying the good-faith exception adopted in *Leon*, and later imported to the qualified-immunity context in *Malley*, is that deterrence cannot be achieved absent a sufficient degree of culpability. *Davis*, 131 S. Ct. at 2427-2428.

logically contribute to the deterrence of Fourth Amendment violations." *Leon*, 468 U.S. at 921.

Because petitioners were neither "plainly incompetent" nor "knowingly violat[ing] the law," *Malley*, 475 U.S. at 341, subjecting them to suit for money damages in their individual capacity for their execution of the warrant will do nothing to deter future Fourth Amendment violations by them or by other officers. It will, however, discourage police officers from zealously (but reasonably) exercising their investigative function and subject them to damages liability for the sort of reasonable mistakes in judgment that are "inevitable" in this context. *Anderson*, 483 U.S. at 641.

## CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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SEPTEMBER 2011

# AMICUS CURIAE BRIEF

No. 10-704

OCT 24 2011
OFFICE OF THE CLERK

IN THE

# Supreme Court of the United States

CURT MESSERSCHMIDT, ET AL.,

*Petitioners,*

—v.—

AUGUSTA MILLENDER, ET AL.,

*Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

## BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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## INTEREST OF *AMICUS*[1]

The American Civil Liberties Union is a nationwide, nonprofit, nonpartisan organization with more than 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. Since its founding more than 90 years ago, the ACLU has appeared before this Court in numerous cases, both as direct counsel and as *amicus curiae*, including *Malley v. Briggs*, 475 U.S. 335 (1986), which is central to the issues presented in this case.

## STATEMENT OF THE CASE

Before dawn on November 6, 2003, members of the Los Angeles County Sheriff's Department SWAT team descended upon the home of 73-year-old Augusta Millender.[2] Within seconds of their clandestine arrival, the SWAT officers shattered the large picture window at the front of the home, broke down the front door, and entered the premises. Mrs. Millender, her 47-year-old daughter, and her grandson, still asleep when the raid began, were forced to evacuate the house and spend the next four

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court. Pursuant to Rule 37.6, counsel for *amicus curiae* states that no party's counsel authored this brief in whole or in part and that no party or party's counsel made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

[2] The factual statement in this brief is based on the Ninth Circuit's *en banc* decision, *Millender v. County of Los Angeles*, 620 F.3d 1016, 1020 (9th Cir. 2010), and the submissions of the parties.

hours outside as sheriff's deputies conducted an exhaustive search of the home.

This search was the culmination of events that began several days earlier when Jerry Lee Bowen fired several shots at his girlfriend, Shelly Kelly, who was attempting to flee the apartment where they lived together in an effort to escape Bowen's domestic abuse. Upon reporting the attack to the Sheriff's Department, Kelly identified Bowen as the perpetrator, described the attack in detail, and told Petitioner Curt Messerschmidt, a 14-year veteran of the Sheriff's Department specializing in gang-related crimes, that Bowen used "a black sawed-off shotgun with a pistol grip" to shoot at her during the altercation. Kelly did not allege that Bowen owned any firearms other than the sawed-off shotgun. When asked if she knew of Bowen's whereabouts, Kelly indicated that she "believed" he was hiding out at a house located at 2234 East 120th Street. That house, apparently unbeknownst to Kelly, belonged to Mrs. Millender, who had once been Bowen's foster mother. Kelly did not state, and Petitioner did not ask, why she believed that Bowen was at the 120th Street address, how she had come upon such information, or whether she knew of other locations where they might find Bowen.[3]

On November 3rd and 4th, sheriff's deputies, including Messerschmidt, surveyed the home located at 2234 East 120th Street and took photos of the

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[3] Bowen had apparently lived in several places during 2003. Earlier in the year, Mrs. Millender allowed him to stay in a detached carriage house on her property for approximately two months. The record also indicates, however, that he was living later that year with his wife at a different address in Los Angeles.

residence, but did not observe Bowen. On November 5th, deputies went to the door and spoke to Mrs. Millender and her daughter on the pretext that there were individuals gambling in front of their home. The deputies did not mention Bowen, nor did they see any trace of him.

Messerschmidt subsequently submitted an affidavit and warrant applications requesting permission to arrest Bowen and to search the 120th Street residence. In his affidavit, Messerschmidt included detailed information regarding the incident with Shelly Kelly, as well as specific information about Bowen, including the fact that Bowen used "a black sawed-off shotgun with a pistol grip" to fire multiple shots at Kelly, and that he was affiliated with a local street gang. The affidavit did not suggest that Bowen's alleged gang ties were connected to the assault on Kelly. The affidavit also failed to mention the three-day-long surveillance that Messerschmidt and his colleagues conducted prior to the search, the fact that they did not observe Bowen at Mrs. Millender's home, or that the residence belonged to Mrs. Millender.

The warrant application accompanying Messerschmidt's affidavit sought authorization to search the 120th Street residence for 1) items tending to establish the identity of persons in control of the premises, 2) all firearms and firearm-related items, and 3) articles of evidence showing, or relevant to, gang membership. J.A. 52. It also sought permission to serve the warrant at night in order to add an "element of safety to the community" and "the deputy personnel serving the warrant, based on the element of surprise" J.A. 59, thus setting the stage for the SWAT team raid that ensued.

The police succeeded in terrifying Mrs. Millender and her daughter (Mrs. Millender was hospitalized for high blood pressure later that day), but they did not find Bowen or the sawed-off shotgun. They did seize a different weapon, lawfully registered to Mrs. Millender, a box of .45 caliber ammunition, and a letter addressed to Bowen from Social Services in June 2003, five months prior to the raid. At that point, Messerschmidt placed the 97th Street apartment Bowen shared with Kelly under surveillance and contacted Kelly to inquire into other places Bowen could potentially be found. Kelly indicated that Bowen might be at a local motel. Less than half an hour later, Bowen was discovered hiding under the bed at the motel and taken into custody.

Mrs. Millender and her family filed suit under 42 U.S.C. § 1983, alleging a violation of their Fourth Amendment rights. They prevailed in the district court, which found that the arrest warrant in this case was facially valid but that the search warrant was unconstitutionally overbroad insofar as it authorized a search of the Millender home for *all* firearms, firearm-related materials, and gang-related items. Having established that a Fourth Amendment violation occurred, the court went on to deny Petitioners' qualified immunity claim, noting that the officers' actions were not objectively reasonable. The district court's qualified immunity decision was affirmed by the court of appeals, *en banc*, on the ground that the warrant was "so lacking in indicia of probable cause as to render official belief in its existence unreasonable." *Millender v. County of Los Angeles*, 620 F.3d 1016, 1020 (9th Cir. 2010).

## SUMMARY OF ARGUMENT

In *Malley v. Briggs*, 475 U.S. 335 (1986), the Supreme Court held that a police officer who obtains a warrant in an objectively unreasonable manner is not entitled to qualified immunity in a §1983 action. The Court's holding in *Malley* balanced society's interests in protecting the core constitutional right to be free from searches and seizures carried out in the absence of probable cause and allowing law enforcement officers to perform their duties in reasonable reliance on judicial warrants without fearing personal liability for the magistrate's errors.

*Malley* did not, however, confer absolute immunity on police officers executing warrants. Rather, *Malley* made clear that a police officer could be held liable for an unconstitutional search, notwithstanding a warrant, if a reasonably well-trained, reasonably competent officer in similar circumstances would have known that the affidavit submitted in support of the search warrant failed to establish probable cause to search for each item identified in the warrant.

Petitioners misconstrue this Court's decisions in *Malley*, *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), and *United States v. Leon*, 468 U.S. 897 (1984), as allowing a damages suit against the police only in instances in which the police conduct in procuring a warrant was egregious. This is a far cry from the "objectively reasonable" standard these cases establish. Moreover, since *Malley*, this Court has consistently reaffirmed the "objectively reasonable" standard, giving no indication that *Malley* needs to be reconsidered in any way.

*Malley* continues to serve a critical function by ensuring compensation for victims of constitutional violations caused by objectively unreasonable actions by law enforcement. While both the exclusionary rule and civil damages under § 1983 play an important role in deterring police transgressions of the Fourth Amendment, only money damages provide redress for the victims when such transgressions occur. Qualified immunity and the exclusionary rule thus serve complementary but not identical functions. While *Malley* rested in part on cases discussing the good faith exception to the exclusionary rule, this Court has never held that the two doctrines are inextricably bound to the same set of rules. In particular, the rationale for this Court's exclusionary rule holding in *Herring v. United States*, 555 U.S. 135 (2009), does not apply to qualified immunity and should not be used to dilute the holding of *Malley*.

Finally, any search not supported by probable cause is per se unconstitutional, regardless of whether a warrant has been issued or not. The Ninth Circuit correctly held that the warrant issued in this case was facially invalid, if viewed from the perspective of an objectively reasonable officer in the Petitioners' shoes, because it authorized what amounted to a general, exploratory search of Mrs. Millender's home for numerous items that the police lacked probable cause to seek. To suggest that an overbroad warrant such as this is permissible, or that Petitioners were reasonable in their belief that the warrant was supported by probable cause, would betray the Framers' longstanding and well-documented hostility toward general warrants and

their insistence that searches be conducted only with particularity and if supported by probable cause.

## ARGUMENT

### I. THE CRITICAL QUESTION UNDER *MALLEY* IS WHETHER A POLICE OFFICER'S RELIANCE ON A DEFECTIVE WARRANT TO CONDUCT AN UNCONSTITUTIONAL SEARCH WAS OBJECTIVELY REASONABLE.

As Respondents convincingly demonstrate, nothing that Petitioners knew at the time they sought a search warrant provided probable cause to search Mrs. Millender's home for any firearms other than the sawed-off shotgun that was used in the attack on Shelly Kelly, or for gang-related material that might be found in Mrs. Millender's home, particularly given Messerschmidt's testimony that he had no reason to believe that the attack on Kelly was gang-related. *See Millender*, 620 F.3d at 1031. The only issue in this case, therefore, is whether Petitioners are entitled to qualified immunity despite seeking and relying on an unconstitutionally overbroad search warrant.

#### A. Contrary To Petitioners' Assertion, *Malley* Does Not Extend Immunity To Police Officers In All But "Egregious" Cases Involving "Flagrant Violations" Of The Fourth Amendment.

This Court in *Malley* rejected a rule that would have granted police officers absolute immunity from suit for seeking a warrant without probable cause. Instead, the Court held that police officers "will not be immune if, on an objective basis, it is

obvious that no reasonably competent officer would have concluded that a warrant should issue." *Id.* at 341. Relying on *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), the Court explained that the qualified immunity inquiry is "whether a reasonably well-trained officer in petitioner's position would have known that his affidavit failed to establish probable cause and that he should not have applied for the warrant." *Malley*, 475 U.S. at 345; *see also Harlow*, 457 U.S. at 818 (government officials are liable for civil damages when their conduct "violate[s] clearly established statutory or constitutional rights of which a reasonable person would have known"). As Justice Powell summarized in his concurrence, *Malley* stands for the proposition "that liability under § 1983 will attach when 'an officer is "constitutionally negligent,"' that is, where the officer should have known that the facts recited in the affidavit did not constitute probable cause.'" *Malley*, 475 U.S. at 348 (Powell, J., concurring in part and dissenting in part) (quoting *Briggs v. Malley*, 748 F.2d 715, 721 (1984)).

Despite *Malley*'s plain language, Petitioners attempt to read a more expansive qualified immunity standard into *Malley* under which police officers can be held liable for applying for unconstitutional search warrants *only* if such violations can be characterized as "flagrant," Pet. Br. at 12, 30, 38, "egregious," Pet. Br. at 17, 19, 20, 23, 26, 30, 38, or demonstrative of "gross incompetence," Pet. Br. at 19, 38. *Malley* says no such thing.[4]

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[4] Notably, neither *Malley* nor *Harlow* contains the words "egregious" or "flagrant." The term "gross incompetence" is absent from *Harlow*, and appears only once in a footnote in

Under *Malley*, the actions of an officer whose request for a warrant caused an unconstitutional arrest are assessed according to their "objective reasonableness." *Malley*, 475 U.S. at 344. While egregious conduct is certainly objectively unreasonable under *Malley*, unreasonable conduct that causes a constitutional violation need not be egregious for a police officer to be subject to suit. Repeatedly, however, Petitioners attempt to reconfigure *Malley* as having delineated the qualified immunity boundary in the search warrant context at egregious conduct, suggesting that the Court should grant Petitioners immunity from suit in this case because it "involves no flagrant abuse or gross incompetence." Pet. Br. at 38. But *Malley*'s demarcation of the qualified immunity line occurs not at "gross incompetence" but "reasonable competence." *Malley* 475 U.S. at 341.

Petitioners rely on a similar misreading of *United States v. Leon*, 468 U.S. 897 (1984), arguing that under *Leon* evidence could be suppressed in "only the most extraordinary circumstances, where the officer's conduct in applying for or relying on the warrant bespoke bad faith." Pet. Br. at 22. Petitioners' conclusion that *Leon* required suppression of evidence only in the face of "egregious [police] conduct that flagrantly violates Fourth Amendment rights," Pet. Br. at 30, is belied by *Leon* itself. The Court in *Leon* clearly explained that the "good-faith inquiry is confined to the objectively

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*Malley* to describe a *magistrate's* conduct in approving a warrant that no officer of *reasonable* competence would have requested. *Malley*, 475 U.S. at 346 n.9 (explaining that an officer "cannot excuse his own default by pointing to the *greater* incompetence of the magistrate." (emphasis added)).

ascertainable question of whether a reasonably well-trained officer would have known that the search was illegal despite the magistrate's authorization." *Leon* at 923 n.23.

Drawing from *Harlow*, the majority in *Leon* was careful to note: "[An] officer's reliance on the magistrate's probable-cause determination and on the technical sufficiency of the warrant he issues must be objectively reasonable, and it is clear that in some circumstances the officer will have no reasonable grounds for believing that the warrant was properly issued." *Id.* at 922-23 (citation omitted). The Court further explained that "[i]n the absence of an allegation that the magistrate abandoned his detached and neutral role, suppression is appropriate only if the officers were dishonest or reckless in preparing their affidavit *or could not have harbored an objectively reasonable belief in the existence of probable cause.*" *Id.* at 926 (emphasis added).

The United States similarly misreads *Malley* when it argues that an officer who "attempt[s] to follow the law," U.S. Br. at 22, by seeking the opinion of other officers and a prosecutor is entitled to qualified immunity by virtue of that fact alone. The objectively reasonable standard announced in *Malley* and *Harlow* is not met simply because a police officer attempts to comply with the Constitution. *See Harlow*, 457 U.S. at 818 (holding that qualified immunity does not depend on the officer's subjective, good faith belief that he was not violating clearly established federal law, but instead hinges on whether that belief was reasonable); *see also Saucier v. Katz*, 533 U.S. 194, 210 (2001) (Ginsburg, J., concurring in the judgment) ("Underlying intent or

motive are not relevant to the inquiry; rather, 'the question is whether the officers' actions are "objectively reasonable" in light of the facts and circumstances confronting them.'" (*quoting Graham v. Connor*, 490 U.S. 386, 397 (1989))); *see also Bruning v. Pixler*, 949 F.2d 352, 356 (10th Cir.1991) ("The subjective component [of qualified immunity] focused on the good faith of the official and relieved him from liability if he did not actually know his conduct was unconstitutional and did not act with malicious intent. *Harlow* eliminated any consideration of the defendant's intent as it relates to his knowledge of the law . . . .").

As *Malley* states, "§ 1983 'should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions.'" *Malley*, 475 U.S. at 345 n.7 (citation omitted). Accordingly, the Court found "it reasonable to require the officer applying for the warrant to minimize th[e] danger [of an unlawful arrest] by exercising reasonable professional judgment," *id.* at 346, as measured by "whether a reasonably well-trained officer in petitioner's position would have known that his affidavit failed to establish probable cause and that he should not have applied for the warrant," *id.* at 345. Moreover, as this Court stated in *Groh v. Ramirez*, 540 U.S. 551 (2004), "[i]t is incumbent *on the officer executing a search* warrant to *ensure* the search is lawfully authorized and lawfully conducted," *id.* at 563 (emphases added), and to fulfill his "duty to *ensure* that the warrant conforms to constitutional requirements," *id.* at 563 n.6 (emphasis added). The fact that an officer merely gave it the old college (or constitutional) try does not mean that the *Malley* test has been satisfied.

In other words, a police officer's violation of constitutional rights may be objectively unreasonable even if done in good faith. As the Court stated in *Graham v. Connor*, 490 U.S. at 397. "[a]n officer's evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force; nor will an officer's good intentions make an objectively unreasonable use of force constitutional." In the context of this case, an officer who seeks a warrant based on an affidavit that a reasonable officer would not view as sufficient to establish probable cause for every item sought, is not shielded from liability simply because he sought the warrant absent malice or deceit.

**B. This Court Has Remained Faithful to *Malley*'s "Objectively Reasonable" Standard.**

The unprecedented reading of *Malley* by Petitioners and their *amici* finds no support in this Court's post-*Malley* pronouncements. Specifically, there has been no indication by this Court since *Malley* that a plaintiff must show "egregious," "flagrant," or "grossly incompetent" conduct to overcome a defendant's assertion of qualified immunity. Instead, in *Anderson v. Creighton*, 483 U.S. 635, 641 (1987), this Court clarified and further cemented the *Malley* standard by establishing a similar qualified immunity formulation that is consistently relied upon: To be liable for damages an officer's actions must be "objectively legally unreasonable." According to *Anderson*, an officer sued under § 1983 is entitled to qualified immunity if, but only if, "a reasonable officer could have believed [the search] to be lawful, in light of clearly established law and the information the searching officers possessed." *Id.* at

641. By clarifying that the relevant inquiry is whether an officer should have known that his conduct was unconstitutional in light of then-current jurisprudence, *see id.* at 646, *Anderson* makes clear that an officer's actions can be unjustified without being "egregious," "flagrant," or "grossly incompetent."

Since *Anderson*, the Court has hewed closely to this conception of qualified immunity. In *Hope v. Pelzer*, 536 U.S. 730 (2002), the Court held that qualified immunity is unavailable where the challenged action's "'unlawfulness [is] apparent,'" *id.* at 739 (quoting *Anderson*, 483 U.S. at 640), so that "'a reasonable person would have known'" that he was committing a constitutional violation in light of the state of the law at the time, *id.* at 744 (quoting *Harlow*, 475 U.S. at 818). In *Groh*, 540 U.S. 551, the Court held that a misstep resulting in an indisputable constitutional violation is actionable even where the violation resulted from what was, arguably, a simple oversight. In *Wilson v. Layne*, 526 U.S. 603, 614 (1999), and again in *Pearson v. Callahan*, 555 U.S. 223, 244 (2009), the Court applied an "objective legal reasonableness" standard. *See Pearson*, 555 U.S. at 231 ("Qualified immunity balances two important interests – the need to hold public officials accountable *when they exercise power irresponsibly* and the need to shield officials from harassment, distraction, and liability *when they perform their duties reasonably*." (emphases added)).

Nothing in any of this Court's post-*Malley* cases suggests that an officer who should have known that his conduct was unconstitutional may invoke qualified immunity if his conduct was not also egregious. *See Burns v. Reed*, 500 U.S. 478 (1991)

("[W]here an official could be expected to know that his conduct would violate statutory or constitutional rights, he *should* be made to hesitate.'" (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 524 (1985)) (internal quotation marks omitted)). Petitioners' attempt to reconstruct *Malley* and its kin as extending qualified immunity to police officers in all but the most offensive cases of police misconduct cannot be reconciled with either *Malley*'s plain language or its subsequent treatment by this Court.

Furthermore, since *Malley*, this Court has not only reaffirmed the nature of the "objectively reasonable" standard, but has also made clear that the standard adequately shields officers from unjustified liability. *See, e.g., Buckley v. Fitzsimmons*, 509 U.S. 259, 268 (1993) ("In most cases, qualified immunity is sufficient to 'protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority.'" (quoting *Butz v. Economou*, 438 U.S. 478, 506 (1978))); *McCleary v. Navarro*, 504 U.S. 966, 967 (1992) (White, J., dissenting from denial of cert.) (the standard, "whether a reasonable officer *could* have thought that he had acted in accordance with the Constitution . . . provides ample room for mistaken judgments" (quotation marks omitted) (citing *Hunter v. Bryant*, 502 U.S. 224, 227 (1991))).

In applying the *Malley* standard, the lower courts have understood that it represents a calibrated balance of interests, and have respected that balance whether granting or denying qualified immunity. *See, e.g., Zarnow v. City of Wichita Falls*, 500 F.3d 401, 409 (5th Cir. 2007) (noting that the *Malley* standard strikes a balance "between

compensating wronged individuals for deprivation of constitutional rights and frustrating officials in discharging their duties for fear of personal liability" (internal quotation marks omitted)); *Burke v. Town of Walpole*, 405 F.3d 66, 76-77 (1st Cir. 2005) (noting that qualified immunity doctrine "aims to balance the desire to compensate those whose rights are infringed by state actors with an equally compelling desire to shield public servants from undue interference with the performance of their duties and from threats of liability which, though unfounded, may nevertheless be unbearably disruptive" (internal quotation marks and brackets omitted)). The bald assertion by Petitioners' *amici* that "the *Malley/Leon* standards [should] be reconsidered or clarified in light of lower courts' inability to apply them in accordance with their purpose of deterring police misconduct, resulting in imposition of liability on officers for good-faith conduct," States Br. at 6, is strikingly unsupported by any statistical evidence or legal citation.

## II. *MALLEY'S* "OBJECTIVELY REASONABLE" STANDARD CONTINUES TO SERVE AN IMPORTANT AND UNIQUE REMEDIAL FUNCTION THAT WOULD BE JEOPARDIZED WERE QUALIFIED IMMUNITY FORCED TO WALK LOCKSTEP WITH THIS COURT'S EVERY PRONOUNCEMENT ON THE GOOD FAITH EXCEPTION TO THE EXCLUSIONARY RULE.

In *Malley*, the Court borrowed from its then-recent decision in *Leon* establishing an "objective reasonableness" standard for the suppression of evidence in criminal cases and applied the same

standard to qualified immunity in the civil context for an officer whose request for a warrant resulted in an unconstitutional arrest. *Malley*, 475 U.S. at 344. Relying on *Leon*, the Court stated that immunity is unavailable where a "warrant application is so lacking in indicia of probable cause as to render official belief in its existence unreasonable." *Id.* at 344-45 (citing *Leon*, 468 U.S. 897, 923 (1984)).

It is not surprising that the Court would hold that both the suppression of evidence in a criminal proceeding and money damages in a civil proceeding may be appropriate remedies when reliance on a warrant is objectively unreasonable because both share a common goal of deterring constitutional violations. *See Malley*, 475 U.S. at 343-44 (stating that an officer's reflection upon whether a reasonable basis exists for believing that an affidavit establishes probable cause before submitting a request for a warrant "is desirable, because it reduces the likelihood that the officer's request for a warrant will be premature. Premature requests for warrants are at best a waste of judicial resources; at worst, they lead to premature arrests, which may injure the innocent or, by giving the basis for a suppression motion, benefit the guilty."); *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 268 (1981) ("[T]he deterrence of future abuses of power by persons acting under color of state law is an important purpose of § 1983."); *Mapp v. Ohio*, 367 U.S. 643, 648 (1961) (barring the use of evidence secured through an illegal search is a "deterrent safeguard without insistence upon which the Fourth Amendment would [be] reduced to a form of words" (internal quotation marks omitted)).

However, it is one thing to say that there is a relationship between the good faith exception to the exclusionary rule and the standard for qualified immunity in Fourth Amendment cases. It is quite another thing to say that "the standards from this Court's qualified immunity jurisprudence *must* inform the scope of the good-faith exception to the exclusionary rule." States Br. at 7 (emphasis added). This Court has never endorsed the latter proposition. To the contrary, it has expressly acknowledged that the good faith exception to the exclusionary rule and the standard for qualified immunity in Fourth Amendment cases "are not perfectly analogous." *Leon*, 468 U.S. at 923, n.23.

In fact, qualified immunity and the exclusionary rule differ in fundamental respects. First, they spring from different historical sources. The qualified immunity doctrine has its roots in the common law defense of good faith and probable cause dating back to the early 19th century. *See Pierson v. Ray*, 386 U.S. 547, 557 (1967). The exclusionary rule, on the other hand, was crafted by the Court less than a century ago specifically to confront violations of the Fourth Amendment.

Second, the scope of the two doctrines is different. Qualified immunity attempts to balance the ability of individuals to recover damages for a wide array of constitutional violations with the need for officials to exercise discretion in a variety of contexts. The exclusionary rule was created specifically to deter encroachments on the Fourth Amendment.

Third, the two doctrines implicate different interests. Qualified immunity is a defense to

constitutional tort claims, most typically arising under § 1983. Section 1983, in turn, was intended not only "to serve as a deterrent against future constitutional deprivations" but "to provide compensation to the victims of past abuses." *Owen v. City of Independence*, 445 U.S. 622, 651 (1980); *see also Wyatt v. Cole*, 504 U.S. 158, 161 (1992) ("The purpose of § 1983 is to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights *and to provide relief to victims if such deterrence fails.*" (emphasis added)); *Harlow*, 457 U.S. at 819 ("The public interest in deterrence of unlawful conduct *and in compensation of victims* remains protected by a test that focuses on the objective legal reasonableness of an official's acts." (emphasis added) (footnote omitted)).

Indeed, "[d]amages as a traditional form of compensation for invasion of a legally protected interest may be entirely appropriate *even if no substantial deterrent effects on future official lawlessness might be thought to result.*" *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 408 (1971) (Harlan, J., concurring) (emphasis added). By contrast, this Court has stated that the "sole purpose" of the exclusionary rule "is to deter future Fourth Amendment violations." *Davis v. United States*, 131 S.Ct. 2419, 2426 (2011). As critical as that function is in our criminal justice system, it "is not calculated to redress the injury to the privacy of the victim of the search or seizure." *Stone v. Powell*, 428 U.S. 465, 486 (1976).

Fourth, and relatedly, denying a motion for qualified immunity does not result in what this Court has determined to be the "harsh sanction of exclusion," *Davis v. United States*, 131 S.Ct. at 2428,

or come at a "high cost to both the truth and the public safety." *Id.* at 2423. Rather, as the Court stressed in *Malley*, a civil damages remedy imposes "a cost directly on the officer responsible for the unreasonable request, without the side effect of hampering a criminal prosecution . . . [, and often will benefit] the most deserving of a remedy—the person who in fact has done no wrong." *Malley*, 475 U.S. at 344. In other words, the exclusionary rule focuses on the admission in a criminal case of inculpating *evidence* obtained through unconstitutional means, while civil damages under § 1983 (which qualified immunity forecloses) are concerned with repairing injuries to *individuals* caused by unconstitutional government conduct.

Any argument that *Malley* should be reinterpreted in light of this Court's exclusionary rule holding in *Herring v. United States*, 555 U.S. 135 (2009), is therefore misplaced and should be rejected. In weighing the costs and benefits of the exclusionary rule under the particular facts presented in *Herring*, the Court concluded that "police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system." The "price" referred to in *Herring*—namely, the inadmissibility of probative evidence in a criminal prosecution—has no relevance in the civil litigation context, where the "price" of applying the *Herring* standard will be the loss of any compensatory remedy for innocent victims of objectively unreasonable police misconduct.[5] That

[5] Such an outcome cannot be reconciled with the fundamental principle that those who suffer a violation of their constitutional rights should normally be entitled to an appropriate judicial

cost would be especially inappropriate because this Court's recent decisions have relied on the availability of civil damages as a partial justification for limiting the scope of the exclusionary rule. *See Hudson v. Michigan*, 547 U.S. 586, 598 (2006) ("As far as we know, civil liability is an effective deterrent here[.]"). As this Court has further recognized, "an action for damages may offer the only realistic avenue for vindication of constitutional guarantees." *Harlow*, 457 U.S. at 814.[6]

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remedy. As Chief Justice Marshall has famously declared: "[T]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. . . . The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803); *see also* 3 William Blackstone, Commentaries *23 ("[I]t is a general and indisputable rule, that where there is a legal right, there is also a legal remedy, by suit or action at law, whenever that right is invaded."); James Madison, The Federalist No. 43, at 274 (Clinton Rossiter ed. 1961) ("[A] right implies a remedy.").

[6] [R]emedies [such as exclusion of evidence or declaratory or injunctive relief] are useless where a citizen not accused of any crime has been subjected to a completed constitutional violation: in such cases, 'it is damages or nothing.'" *Mitchell*, 472 U.S. at 523 (quoting *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 410 (1971) (Harlan, J., concurring)); *see also City of Los Angeles v. Lyons*, 461 U.S. 95, 105 (1983) (rejecting standing for injunctive relief where plaintiff is not "likely to suffer future injury from the use of chokeholds by police officers"); *Monell v. Dep't of Social Services*, 436 U.S. 658, 694 (1978) (holding that municipalities can only be sued under § 1983 for an unconstitutional policy or practice).

## III. THE WARRANT CLAUSE IS CRITICAL TO THE FOURTH AMENDMENT, ESPECIALLY WHEN SEARCHING A HOME, AND A SEARCH THAT VIOLATES THE WARRANT CLAUSE BECAUSE THE WARRANT LACKS PROBABLE CAUSE IS PER SE UNCONSTITUTIONAL.

### A. *Amici* States' Brief Mischaracterizes The Ninth Circuit's Rationale For Finding That Both The Search Warrant And Actual Search Violated Respondents' Fourth Amendment Rights.

*Amici* States mischaracterize the Ninth Circuit's rationale as to why the search warrant in this case, as well as the corresponding search itself, violated Respondents' Fourth Amendment rights. While it is true, of course, that not all warrantless searches are necessarily unconstitutional, it is equally true that any search conducted without probable cause—whether or not a warrant issues—is per se unconstitutional.

As an initial matter, the *amici* States ignore, or misinterpret, the Ninth Circuit's determination that the warrant at issue in this case was facially *invalid*. *See Millender*, 620 F.3d at 1035 ("Where, as here, the warrant was so facially invalid that no reasonable officer could have relied on it, the deputies are not entitled to qualified immunity . . . ."). The court arrived at that decision based on its conclusion that the warrant suffered from a "glaring deficiency," namely that "[n]either it nor the affidavit established probable cause that the broad categories of firearms, firearm-related material, and gang-related material described in the warrant were contraband or evidence of a crime." *Id.* at 1033.

Importantly, the court of appeals began from the premise that its analysis of the qualified immunity question turns on what a reasonable officer "in the deputies' position" would have believed. *Id.* As such, the court concluded that "[t]he affidavit indicated exactly what item was evidence of a crime, the black sawed-off shot-gun with a pistol grip, and reasonable officers would know they could not undertake a general, exploratory search for unrelated items unless they had additional probable cause for those items." *Id.* Hence, to the extent that the *amici* States are suggesting implicitly that the warrant would have appeared to be facially valid to a reasonable officer unaware of the background facts, they employ the wrong standard and misrepresent the Ninth Circuit's findings.[7]

In outlining the contours of the Fourth Amendment in its decision below, the Ninth Circuit makes clear that the law requires both that a warrant describe with sufficient particularity the items to be searched and/or seized, and that "the scope of the warrant be limited by the probable cause on which the warrant is based." *Id.* at 1024. The court further noted that the probable cause requirement "encapsulates the overarching Fourth

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[7] *See, e.g., Jenkins v. City of New York*, 478 F.3d 76, 87 (2d Cir. 2007) ("If officers of reasonable competence would have to agree that the information possessed by the officer at the time of arrest did not add up to probable cause, the fact that it came close does not immunize the officer."); *Storck v. City of Coral Springs*, 354 F.3d 1307, 1317 n.5 (11th Cir. 2003) ("The analysis of arguable probable cause is not concerned with what [the plaintiff] thought or knew, but rather, what a reasonable officer knowing what [the defendant officer] knew could have thought.").

Amendment principle that police must have probable cause to search for and seize 'all the items of a particular type described in the warrant.'" *Id.* (quoting *In re Grand Jury Subpoenas*, 926 F.2d 847, 857 (9th Cir. 1991)).

Contrary to the *amici* States' assertions, nowhere does the court suggest that all warrantless searches, no matter the context, are per se unreasonable. Indeed, the notion that police may carry out warrantless searches and/or seizures under certain limited circumstances is undisputed and unremarkable. As the court of appeals appropriately acknowledged, "officers may make a warrantless entry into a residence under certain exigent circumstances, such as when they have an objectively reasonable basis for believing that an occupant is seriously injured or imminently threatened with such injury . . . ." *Millender*, 620 F.3d at 1033 (internal quotation marks omitted). But "the exigent circumstances doctrine is an exception to the warrant requirement, not an authorization for the deputies to apply for a warrant that is not supported by probable cause." *Id.*

**B. The Fourth Amendment Reflects The Framers' Antipathy Toward General Warrants, Particularly Those Involving Searches Of The Home, And Seeks To Ensure That Searches Are Conducted With Particularity And Only Where Probable Cause Exists.**

The Fourth Amendment has long been understood as a "reaction to the evils of the use of the general warrant in England and the writs of assistance in the Colonies," and as an effort to "protect against invasions of the sanctity of a man's

home and the privacies of life from searches under indiscriminate, general authority." *Warden, Md. Penitentiary v. Hayden*, 387 U.S. 294, 301 (1967) (internal quotation marks and citation omitted).

Two distinct functions are served by the Fourth Amendments warrant requirement. "First, the magistrate's scrutiny is intended to eliminate altogether searches not based on probable cause." *Coolidge v. New Hampshire*, 403 U.S. 443, 467 (1971). Second, the warrant requirement ensures that "those searches deemed necessary [are] as limited as possible," as the evil of unrestrained searches "is not that of intrusion per se, but of a general, exploratory rummaging in a person's belongings." *Id.* The necessity of a warrant achieves this latter goal by enforcing the particularity requirement of the Fourth Amendment's text, *i.e.*, that "no Warrants shall issue, but . . . particularly describing the place to be searched, and the persons or things to be seized." "By limiting the authorization to search to the specific areas and things for which there is probable cause to search, the requirement ensures that the search will be carefully tailored to its justifications." *Maryland v. Garrison*, 480 U.S. 79, 84 (1987); *see also Marron v. United States*, 275 U.S. 192, 196 (1927) (stating that "[t]he requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant.").

Accordingly, courts have routinely invalidated warrants whose "description. . . of the place to be searched is so vague that it fails reasonably to alert

executing officers to the limits of their search authority." *United States v. Clark*, 638 F.3d 89, 94 (2d Cir. 2011); *see also Davis v. Gracey*, 111 F.3d 1472, 1479 (10th Cir. 1997) (explaining that warrants are invalid "where the language of the warrants authorized the seizure of virtually every document that one might expect to find in a . . . company's office, including those with no connection to the criminal activity providing the probable cause for the search" (internal quotation marks omitted)); *United States v. Kow*, 58 F.3d 423, 427 (9th Cir. 1995) (same where warrant "contained no limitations on what documents within each category could be seized or suggested how they related to specific criminal activity").

Here, much like in *Gracey* and *Kow*, the language of the warrant authorized seizure of all firearms and firearm-related materials, without limitation and including those "with no connection to the criminal activity providing the probable cause for the search," *Gracey*, 11 F.3d at 1479, notwithstanding the fact that the deputies possessed specific information regarding the weapon used by Bowen during the assault, including a photograph provided by Kelly. Hence, the deputies were well aware of precisely what they were searching for and should have known that they did not possess probable cause to expand the search to encompass all firearms—let alone all gang-related materials, particularly since Messerschmidt acknowledged that he had no reason to believe that Bowen's assault on Kelly was gang-related. *See supra* p. 7.

## CONCLUSION

For the reasons stated above, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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# AMICUS CURIAE BRIEF

No. 10-704

# In the Supreme Court of the United States

CURT MESSERSCHMIDT *et al.*,

*Petitioners*

v.

AUGUSTA MILLENDER *et al.*,

*Respondents*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

## BRIEF OF AMICI CURIAE NATIONAL RIFLE ASSOCIATION OF AMERICA, INC., AND CALIFORNIA RIFLE AND PISTOL ASSOCIATION FOUNDATION, INC., IN SUPPORT OF RESPONDENTS


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## QUESTIONS PRESENTED

1. Whether law enforcement officers are entitled to qualified immunity where they had probable cause to search for a specifically-identified firearm from a suspect whose whereabouts they were unsure of, but obtained and executed what was facially a general warrant to search the residence of innocent third parties for any and all firearms, knowingly misrepresented the house to be searched as the "residence" of the suspect, and seized the firearm of an occupant which bore no resemblance to the suspect's firearm.

2. Whether this Court should overrule *Malley v. Briggs*, 475 U.S. 335, 344-45 (1986), and other established precedents subjecting law enforcement officers to liability under civil rights legislation for obtaining a search warrant "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable."

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## STATEMENT OF INTEREST OF AMICI CURIAE

The National Rifle Association of America, Inc. ("NRA") is a New York not-for-profit membership corporation founded in 1871.[1] NRA has approximately four million individual members and 10,700 affiliated members (clubs and associations) nationwide. NRA's purposes, as set forth in its Bylaws, include the following:

> To protect and defend the Constitution of the United States, especially with reference to the inalienable right of the individual American citizen guaranteed by such Constitution to acquire, possess, transport, carry, transfer ownership of, and enjoy the right to use arms, in order that the people may always be in a position to exercise their legitimate individual rights of self-preservation and defense of family, person, and property, as well as to serve effectively in the appropriate militia for the common

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[1]No counsel for any party to this case authored this brief in whole or in part, no such counsel or party made a monetary contribution intended to fund the preparation or submission of the brief, and no person or entity other than the *Amici Curiae* or their counsel made such a monetary contribution. This brief is filed with the written consent of all parties.

> defense of the Republic and the individual liberty of its citizens . . . .

NRA's interest in this case stems from the fact that NRA members nationwide will be affected by any ruling this Court may make, which will define their rights and the rights of millions of gun owners under the Second, Fourth, and Fourteenth Amendments to the United States Constitution.

The California Rifle and Pistol Association (CRPA) Foundation is a non-profit entity classified under section 501(c)(3) of the Internal Revenue Code and incorporated under California law, with headquarters in Fullerton, California. It is affiliated with the California Rifle and Pistol Association, Inc., which has roughly 65,000 members.

The CRPA Foundation seeks to raise awareness about unconstitutional laws, defend and expand the legal recognition of the rights protected by the Second Amendment, promote firearms and hunting safety, protect hunting rights, enhance marksmanship skills of those participating in shooting sports, and educate the general public about firearms. The CRPA Foundation also supports law enforcement and various charitable, educational, scientific, and other firearms-related public interest activities that support and defend the Second Amendment rights of all law-abiding Americans.

The Amici Curiae have considerable experience litigating constitutional rights in relation to firearms before this Court and elsewhere and wish to bring their unique perspective to this Court's attention.

## SUMMARY OF ARGUMENT

The deputies here had probable cause to seize a specific firearm from a suspect whose whereabouts they were unsure of. Instead they secured a general warrant to seize all firearms from all persons in a house where the suspect's foster mother lived. A reasonable officer would not have sought or executed such a warrant, which violated clearly-established rights, precluding the defense of qualified immunity. No reason exists to disturb the standards on this score set forth in *United States v. Leon,* 468 U.S. 897 (1984), and *Malley v. Briggs,* 475 U.S. 335 (1986).

General warrants to search for and seize firearms were a long-standing oppression imposed by the Crown. The rights against unreasonable searches and seizures and to keep and bear arms were in the forefront of rights demanded to be recognized and later adopted in the Bill of Rights. Protection of these rights from State infringement would become an impetus for adoption of the Fourteenth Amendment and enforcement legislation, particularly § 1983.

The need to avoid general warrants is enhanced regarding lawful or constitutionally-protected property. Millions of Americans lawfully possess firearms. A warrant to seize all firearms in a house resided in by persons who were not suspects and where the suspect was not confirmed to be hiding clearly violated the Fourth Amendment. Warrants to search for arms which may be protected by the Second Amendment must be scrutinized with scrupulous exactitude.

Both from the text of the Fourth Amendment and from caselaw going back for centuries, the unlawfulness of general warrants is clearly established, and the warrant here was facially a general warrant. It is not required that a precedent exist with the same exact details. It is not a defense that a magistrate signed the warrant, especially where the officer made misleading allegations in the affidavit, and probable cause to seize all items of a kind was lacking.

*Groh v. Ramirez*, 540 U.S. 551 (2004), rejected qualified immunity involving a general warrant to search for unregistered firearms which contained no list of firearms to seize. This case is more egregious than *Groh*, because there the officer listed the firearms to seize in the affidavit but mistakenly failed to make it a part of the warrant. Here, the officer procuring the warrant misled the magistrate, but even then the warrant was facially unconstitutional. He cannot now rely on the defense that he persuaded others up the chain to approve his general warrant.

## ARGUMENT

### Introduction

This case may be resolved by well-established principles that have stood the test of time and should not be disturbed. "Only where the warrant application is so lacking in indicia of probable cause as to render official belief in its existence unreasonable, . . . will the

shield of immunity be lost." *Malley v. Briggs*, 475 U.S. 335, 344-45 (1986), citing *United States v. Leon*, 468 U.S. 897, 923 (1984). The issue here is "whether a reasonably well-trained officer in petitioner's position would have known that his affidavit failed to establish probable cause and that he should not have applied for the warrant." *Malley*, at 345. A magistrate may be "working under docket pressures" and approve a bad warrant, *id.* at 345-46 n.8, in which case "[t]he officer then cannot excuse his own default by pointing to the greater incompetence of the magistrate." *Id.* at 346 n.9.

Put otherwise, the magistrate must "not serve merely as a rubber stamp for the police." *Leon*, at 914 (citation omitted). A court must resolve "whether a reasonably well trained officer would have known that the search was illegal despite the magistrate's authorization." *Id.* at 922 n.23. Suppression is appropriate if the magistrate "was misled by information in an affidavit that the affiant knew" or should have known was false, the affidavit is "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable," or the warrant is "so facially deficient – i.e., in failing to particularize the place to be searched or the things to be seized – that the executing officers cannot reasonably presume it to be valid." *Id.* at 923 (citations omitted). All three of these deficiencies may be found in the warrant here.

In this case, officers had probable cause to believe that a suspect used a black, short-barreled shotgun with a pistol grip in an assault. However, they secured a general warrant to search in the nighttime a house where ten other persons resided for all firearms, accessories, and related documents. In doing so, they

violated the clearly-established rights of the Millenders and other occupants against unreasonable search and seizure, and are not entitled to the defense of qualified immunity.

When Shelly Kelly sought to break off her relationship with Jerry Ray Bowen, the latter pointed a "black sawed off shotgun with a pistol grip" at her, firing it as she sped off in a vehicle. *Millender v. County of Los Angeles*, 620 F.3d 1016, 1020 (9th Cir. 2010) (*en banc*). Kelly was familiar with the shotgun, described it to Detective Messerschmidt, and even gave him photographs of the suspect with the shotgun. *Id.* at 1021, 1027.

The officer then obtained a warrant to search the house of Augusta Millender, a 73-year-old lady who had been Bowen's foster mother 15 years earlier. His affidavit failed to disclose that Ms. Millender, her daughter, and her grandson resided at the house; Bowen did not reside there.[2] Kelly suggested that he could be hiding there, an allegation the officer failed to confirm. Instead of obtaining a search warrant for the black sawed-off shotgun with a pistol grip, Messerschmidt obtained a warrant for, *inter alia*:

> All handguns, rifles or shotguns of any caliber, or any firearms capable of firing ammunition or firearms or devices modified or designed to allow it to fire ammunition. All caliber of ammunition, miscellaneous gun parts, gun cleaning

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[2]The Search Warrant, Attachment 1, stated: "Location to be Searched: 2234 E. 120th Street, Los Angeles." After a physical description, it concluded simply: "Residence of Jerry Ray Bowen."

> kits, holsters which could hold or have held any caliber handgun being sought. Any receipts or paperwork, showing the purchase, ownership, or possession of the handguns being sought. Any firearm for which there is no proof of ownership. Any firearm capable of firing or chambered to fire any caliber ammunition.[3]

*Millender*, 620 F.3d at 1022.

The affidavit did not allege that any of the above items were unlawfully possessed or articulate how they might be connected to the investigation. It did say that Bowen was a gang member, but did not say that he had a disabling criminal record. Persons who are "gang" members are not among the lists of persons prohibited from firearm possession. 18 U.S.C. § 922(g); Ca. Penal Code §§ 12021, 12021.1.[4]

A SWAT team served the warrant at 5:00 a.m. Bowen was not there, but officers threw the Millenders out on the street and ransacked the house. Officers

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[3]In addition, the Search Warrant, Attachment 1, stated: "The search additionally to include, any person(s) therein who could upon their person, conceal weapons, or ammunition, all safes and locked containers."

[4]*See Lanzetta v. New Jersey*, 306 U.S. 451, 452-53 (1939) (invalidating prohibition on "gang" membership as vague). By some definitions, "the purposes of those constituting some gangs may be commendable, as, for example, groups of workers engaged under leadership in any lawful undertaking." *Id.* at 457. *See also City of Chicago v. Morales*, 527 U.S. 41, 45-46 (1999) (invalidating ordinance making it a crime to loiter after police have ordered dispersal where one of the persons is a "criminal street gang member").

seized Ms. Millender's personal shotgun (a black 12-gauge Mossberg with a wooden stock) and a box of .45 caliber American Eagle ammunition. 620 F.3d at 1023. The court *en banc* held that probable cause existed to search for the described shotgun, but not "the generic class of firearms and firearm-related materials listed in the search warrant." *Id.* at 1025. Officers had "a precise description of the firearm" used by the suspect, and Ms. Millender's shotgun "did not resemble" it. *Id.* at 1027.

No "dangerousness" exception exists to the probable cause requirement, and thus it was irrelevant that the search involved a violent suspect or firearms. "Nor is there a per se rule that police have probable cause to search the residences of ex-felons for firearms and firearm-related items." *Id.* at 1028. The court rejected the argument "that any caliber of shotgun or receipts would show the possession and purchase of guns," in that "the possession and purchase of guns by itself does not constitute contraband or evidence of a crime." *Id.* at 1030. No basis existed "for probable cause to search and seize the broad category of firearm and firearm-related materials set forth in the warrant," and thus "the magistrate lacked a substantial basis for issuing the warrant for this broad range of items." *Id.* at 1030.

The *en banc* court next considered whether the rights at issue were clearly established so as to confer qualified immunity on the officers, which raised the issue of whether a reasonably well-trained officer would have known that his affidavit lacked probable cause and that he should not have applied for it. *Id.* at 1032. Where a warrant is so lacking in probable cause, the officer may not rely on the magistrate's approval of

the warrant. *Id.* The court held that "the warrant was so facially invalid that no reasonable officer could have relied on it, the deputies are not entitled to qualified immunity, and the Millenders can proceed with their § 1983 claim." *Id.* at 1035.

The issue in *Millender* is significant far beyond civil rights actions, for often in criminal cases involving just one or more identifiable firearms, law enforcement officers obtain search warrants with the same broad scope of seizing all firearms, parts, and related papers on the premises. This Court should send a firm message disapproving of such general warrants.

Both Petitioners and amicus curiae United States pile inference upon inference, leap-frogging from probable cause to seize one gun from one suspect at an unclear location to improbable cause to seize all guns from all persons residing at a house where someone suggested the suspect "might" be hiding. They imply that probable cause always exists to suspect that a "gang member" or a felon (even though not identified as such in the affidavit here) unlawfully possesses firearms. By that logic, without anything more, probable cause exists at any time or place to obtain search warrants for firearms for any and every person who is a "gang member" or has a felony record.
Petitioners well knew that multiple persons resided in the Millender home but failed to disclose that to the magistrate. These residents had a Fourth Amendment right "to be secure in their . . . house[] . . . against unreasonable searches and seizures . . . ." They also had a Second Amendment right "to keep and bear arms . . . ." Petitioners obtained and executed the warrant in total and reckless disregard of the clearly-established

rights of Respondents, and are not entitled to qualified immunity.

## I. A WARRANT TO SEIZE ALL FIREARMS IN THE HOME OF PERSONS WHO ARE NOT SUSPECTS VIOLATES SECOND AND FOURTH AMENDMENT RIGHTS

A general warrant to confiscate all firearms in a house where several persons reside makes a mockery of the security of person and home protected by the Fourth Amendment. Such a warrant is all the more insidious given that the Second Amendment guarantees the right of the victims of such an intrusion to keep and bear arms.

General warrants to search for and seize firearms were a long-standing oppression imposed by the Crown. General warrants and deprivation of the right to have arms were related grievances of the American colonists. The rights against unreasonable searches and seizures and to keep and bear arms were in the forefront of rights demanded to be recognized and later adopted in the Bill of Rights. Protection of these rights against State infringement would later become a strong impetus for adoption of the Fourteenth Amendment.

### A. The Text

The Fourth Amendment provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue, but upon probable cause, supported by oath or

affirmation, and particularly describing the place to be searched and the person or thing to be seized."

This right to security in one's person, house, and property plainly precludes an officer from securing a search warrant to seize property from all residents of a house in the context here. Moreover, there must be probable cause to search the place that is particularly described – not just a suggestion that a suspect "might" be hiding there – as well as to seize the thing that is particularly described – not all things of a given kind from anyone residing at the house.

That is all the more the case when those things are firearms, given that the Second Amendment provides that "the right of the people to keep and bear arms, shall not be infringed." This right, which the text clearly establishes, surely precludes an officer from securing a warrant to seize all firearms from all persons in a house, when he well knows that he should be seeking to seize one firearm from one suspect whose whereabouts he does not know and whose nexus with that house is dubious.

Since firearms are lawful to possess and are constitutionally protected, no basis exists for a search warrant to seize them absent rigorous fulfillment of the Fourth Amendment's probable cause and particularity requirements. The general warrant here to seize all firearms from all persons at the dwelling, and the seizure of Ms. Millender's shotgun, both violated the Fourth Amendment and infringed on her Second Amendment right to keep arms.

## B. A Purpose of the Fourth Amendment, Buttressed by the Second Amendment, Was to Preclude General Warrants to Seize Firearms

It would be an understatement to say that the Fourth Amendment right against general warrants is "clearly established." "It is familiar history that indiscriminate searches and seizures conducted under the authority of 'general warrants' were the immediate evils that motivated the framing and adoption of the Fourth Amendment." *Payton v. New York*, 445 U.S. 573, 583 (1980). The following demonstrates that historically, a primary purpose of the Fourth Amendment was to prevent general warrants to seize firearms.

### 1. English and Pre-Revolutionary Background

The historical oppressions giving rise to the Second and Fourth Amendments – and the First as well, for that matter – are intertwined. In 1662, Charles II passed a militia bill which empowered Lords Lieutenants and their deputies to issue warrants "to search for and seize all arms in the custody or possession of any person or persons whom the said lieutenant or any two or more of their deputies shall judge dangerous to the peace of the kingdom . . . ." 13 & 14 Car. 2, c. 3, § 13 (1662). While "no such search [may] be made in any house" between sundown and sunup, in cities and towns "it shall be lawful to search in the night time by Warrant as aforesaid if the Warrant shall so direct . . . ." *Id.* Constables and officers who assisted in such searches and seizures

were "saved harmless and indemnified." *Id.* § 14.[5] In other words, they were immunized from common-law actions for damages.[6]

General warrants were also authorized to search for unlicensed printed matter[7] and for uncustomed goods through writs of assistance.[8] These were among the laws the Stuart Kings, Charles II and James II, used "to suppress political dissidents, in part by disarming their opponents," and "what the Stuarts had tried to do to their political enemies, George III had tried to do to the colonists." *District of Columbia v. Heller*, 554 U.S. 570, 594 (2008). That explains why, "[b]y the time of the founding, the right to have arms had become fundamental for English subjects." *Id.* at 593. The First, Second, and Fourth Amendments were designed to prevent these very abuses.

The use of general warrants to search for uncustomed goods prompted the famous arguments by James Otis in *Petition of Lechmere* (1761), which John Adams recorded. Otis averred:

> I will to my dying day oppose . . . all such instruments of slavery on the one hand,

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[5]A previous enactment, noting ongoing searches and seizures against the Crown's enemies, provided that magistrates involved in "seizing of Armes or searching of Houses for Armes or for suspected persons shall be and are hereby saved harmelesse and indempnified in that behalfe." 13 Car. 2, ch. 6, § 2 (1661).

[6]*See Payton*, 445 U.S. at 591-98 (discussion of common-law action in trespass for unlawful searches).

[7]13 & 14 Car. 2, c. 33, §§15, 19 (1662).

[8]13 & 14 Car. 2, c. 2, §5(2) (1662).

> and villainy on the other, as this writ of assistance is. It appears to me . . . the worst instrument of arbitrary power, the most destructive of English liberty, and the fundamental principles of the constitution, that ever was found in an English law-book.[9]

General warrants were particularly insidious, Otis continued, because "one of the most essential branches of English liberty, is the freedom of one's house. A man's house is his castle; and while he is quiet, he is as well guarded as a prince in his castle. Now this writ, if it should be declared legal, would totally annihilate this privilege."[10] The writ originated "in the zenith of arbitrary power, viz. in the reign of Car. II. when Star-chamber powers were pushed in extremity . . . ."[11]

Lord Camden's opinion in *Entick v. Carrington*, 19 How. St. Tr. 1029 (K.B.1765), was the classic statement against general warrants which influenced the framers of the Fourth Amendment. After a search of his house and seizure of all of his papers under a general warrant seeking evidence of seditious libel, the

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[9]2 *Legal Papers of John Adams* 139-40 (1965). Otis referred to Hawkins, *Pleas of the Crown* 82, which stated: "But it seems to be very questionable whether a Constable can justify the Execution of a general Warrant to search for Felons or stolen Goods, because such Warrant seems to be illegal in the very face of it . . . ." *Id.* at 126 n.65.

[10]*Id.* at 142.

[11]*Id.* at 143-44.

plaintiff sued and was awarded damages against a member of the search party and the official who issued the warrant. Similarly, a general warrant to search for any firearms, such as that here, would involve a fishing expedition to see if any violations of law could be found unrelated to the crime for which the warrant was secured. One may substitute the term "arms" for "papers" in *Entick* and have a description of what happened in this very case:

> In consequence of this, the house must be searched; the lock and doors of every room, box, or trunk must be broken open; all the papers and books without exception, if the warrant be executed according to its tenor, must be seized and carried away; for it is observable, that nothing is left either to the discretion or to the humanity of the officer.
>
> This power, so assumed by the secretary of state, is an execution upon all the party's papers, in the first instance. His house is rifled; his most valuable secrets are taken out of his possession, before the paper for which he is charged is found to be criminal by any competent jurisdiction, and before he is convicted . . . .

*Entick*, 19 How. St. Tr. at 1064.

In *Boyd v. United States*, 116 U.S. 616, 630 (1886), *overruled on other grounds*, *Warden v. Hayden*, 387 U.S. 294 (1967), Justice Bradley famously observed about the principles in the *Entick* opinion:

> [T]hey apply to all invasions on the part of the government and its employees of

> the sanctity of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty, and private property, where that right has never been forfeited by his conviction of some public offense, – it is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden's judgment.[12]

In his notes of the 1765 trial in *Bassett v. Mayhew*, John Adams stated the law clearly: "Constable liable in executing General Warrant."[13] And in the 1774 case of *King v. Stewart*, Adams wrote: "An Englishman's dwelling House is his Castle. . . . [E]very Member of Society has entered into a solemn Covenant with every other that shall enjoy in his own dwelling House as compleat a security, safety and

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[12]This Court has repeatedly recalled *Entick*'s condemnation of general warrants. *E.g.*, *Berger v. New York*, 388 U.S. 41, 58 (1967) (invalidating statute authorizing eavesdropping warrants "for evidence of crime" without any particularity requirement). As if to respond to Petitioners' arguments here, this Court stated that "it is not asking too much that officers be required to comply with the basic command of the Fourth Amendment before the innermost secrets of one's home or office are invaded." *Id.* at 63.

[13]1 *Legal Papers of John Adams* 102.

Peace and Tranquility as if it was . . . defended with a Garrison and Artillery."[14]

The conflict that escalated in the colonies during 1774-75 was prompted in great part by the increased resort by General Thomas Gage to searches and seizures of firearms from the colonists – first from ships importing them, then from individuals carrying or transporting them, and finally from their houses. See Stephen P. Halbrook, *The Founders' Second Amendment* chs. 3-4 (2008).

To guard against these violations, the new states enacted guarantees. For instance, Pennsylvania declared: "That the people have a right to bear arms for the defence of themselves and the state . . . ." Pa. Dec. of Rights, Art. XIII (1776). Moreover, Art. X provided:

> That the people have a right to hold themselves, their houses, papers, and possessions free from search or seizure, and therefore warrants without oaths or affirmations first made, affording a sufficient foundation for them, and whereby any officer or messenger may be commanded or required to search suspected places, or to seize any person or persons, his or their property, not particularly described, are contrary to that right, and ought not to be granted.

Not surprisingly, when the Constitution was proposed in 1787 without mention of such rights, an outcry arose that would culminate in adoption of the Bill of Rights.

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[14] *Id.* at 137.

## 2. The Interrelated Demands for and Adoption of the Second and Fourth Amendments

Insight into the fundamental character of the rights to have arms and against unreasonable searches and seizures may be gleaned from the demands for a bill of rights by the State conventions which ratified the Constitution. The first conventions made no such demand, but minorities therein did. The Dissent of the Minority in Pennsylvania declared:

> 5. That warrants unsupported by evidence, whereby any officer or messenger may be commanded or required to search suspected places, or to seize any person or persons, his or their property, not particularly described, are grievous and oppressive, and shall not be granted either by the magistrates of the federal government or others.
>
> 7. That the people have a right to bear arms for the defense of themselves and their own state, or the United States, or for the purpose of killing game; and no law shall be passed for disarming the people or any of them, unless for crimes committed, or real danger of public injury from individuals . . . .[15]

Reading the above provisions together, arms could be seized, but only for crime and the like, and

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[15]2 *Documentary History of the Ratification of the Constitution* 623-24 (1976).

only if supported by evidence and particularly described in a search warrant.

In the Massachusetts convention, Samuel Adams proposed a declaration of rights which stated in part:

> And that the said Constitution be never construed to authorize Congress . . . to prevent the people of the United States, who are peaceable citizens, from keeping their own arms; . . . or to subject the people to unreasonable searches & seizures of their persons, papers, or possessions.[16]

In the Virginia ratification convention, Patrick Henry warned that "general warrants . . . ought to be prohibited. . . . [A]ny property may be taken, in the most arbitrary manner, without any evidence or reason. Every thing the most sacred may be searched and ransacked by the strong hand of power."[17] The convention demanded a federal bill of rights that would state in part:

> 14th. That every freeman has a right to be secure from all unreasonable searches and seizures of his person, his papers, and property; all warrants, therefore, to search suspected places, or seize any freeman, his papers, or property, without information on oath (or

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[16]6 *Documentary History of the Ratification of the Constitution* 1453 (2000).

[17]3 J. Elliot, *Debates in the Several State Conventions on the Adoption of the Federal Constitution* 588 (1836).

> affirmation of a person religiously scrupulous of taking an oath) of legal and sufficient cause, are grievous and oppressive; and all general warrants to search suspected places, or to apprehend any suspected person, without specially naming or describing the place or person, are dangerous, and ought not to be granted.
>
> . . .
>
> 17th. That the people have a right to keep and bear arms; that a well-regulated militia, composed of the body of the people trained to arms, is the proper, natural, and safe defence of a free state . . . .[18]

The North Carolina convention demanded a declaration concerning search warrants and the right to bear arms identical with that of Virginia.[19] New York's declaration on searches was virtually identical, its final clause differing slightly by stating "that all general warrants (or such in which the place or person suspected are not particularly described) are dangerous, and ought not to be granted."[20] Its clause on the arms right was identical, other than its reference to "the body of the people *capable of bearing*

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[18] *Id.* at 658-59.

[19] 18 *Documentary History of the Ratification of the Constitution* 316 (1995).

[20] *Id.* at 299.

*arms . . . .*"[21] Rhode Island copied New York's language.[22]

On June 8, 1789, James Madison introduced his bill with a draft bill of rights in the House of Representatives. It included the following:

> The right of the people to keep and bear arms shall not be infringed; a well armed, and well regulated militia being the best security of a free country . . . .
>
> . . .
>
> The rights of the people to be secured in their persons, their houses, their papers, and their other property from all unreasonable searches and seizures, shall not be violated by warrants issued without probable cause, supported by oath or affirmation, or not particularly describing the places to be searched, or the persons or things to be seized.[23]

Madison described the latter provision as "the article of general warrants."[24] The House Select

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[21] 18 *Documentary History of the Ratification of the Constitution* 298 (1995).

[22] 1 J. Elliot, *Debates in the Several State Conventions on the Adoption of the Federal Constitution* 335 (1836).

[23] 4 *Documentary History of the First Federal Congress of the United States of America* 10-11 (1986).

[24] Helen E. Veit *et al.* eds, *Creating the Bill of Rights* 67 (1991).

Committee revised Madison's proposals in relevant part as follows:

> A well regulated militia, composed of the body of the people, being the best security of a free state, the right of the people to keep and bear arms shall not be infringed . . . .
>
> . . .
>
> The right of the people to be secure in their persons, houses, papers, and effects, shall not be violated by warrants issuing, without probable cause supported by oath or affirmation, and not particularly describing the places to be searched, or the persons or things to be seized.[25]

The House then revised the language on searches to what would become, after the Senate agreed, the Fourth Amendment. Veit, *Creating the Bill of Rights* 39, 48. The Senate revised the House language of the arms guarantee to what would become the Second Amendment. *Journal of the First Session of the Senate of the United States of America* 71, 77 (1820).

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[25] 4 *Documentary History of the First Federal Congress of the United States of America* 28-29 (1986).

### C. A Central Concern of the Fourteenth Amendment Was to Prevent Seizure of Firearms from the Houses of Innocent Citizens

After the Civil War, the Southern States enacted the Black Codes, which prohibited freed slaves from firearm possession and prompted massive search-and-seizure operations to confiscate firearms. Primary objectives of the Fourteenth Amendment were to protect the right to keep firearms and to preserve the sanctity of the home from searches and seizures. *See Heller*, 554 U.S. at 614-15; *McDonald v. City of Chicago*, 130 S.Ct. 3020, 3038-40 (2010).

Congress heard numerous reports from the Southern States about the routine search and seizure of firearms from freedmen, particularly in their homes. From Mississippi, it was reported that militias typically would "hang some freedman or search negro houses for arms." Cong. Globe, 39th Cong., 1st Sess. 941 (Feb. 20, 1866). In Alabama, militias "were ordered to disarm the freedmen, and undertook to search in their houses for this purpose." *Journal of the Joint Committee of Fifteen on Reconstruction*, pt. 3, at 140 (1914). And from Wilmington, North Carolina, it was reported:

> Some of the local police have been guilty of great abuses by pretending to have authority to disarm the colored people. They go in squads and search houses and seize arms. . . . Houses of colored men have been broken open, beds torn apart and thrown about the floor, and even trunks opened and money taken.

*Report of the Joint Committee on Reconstruction*, H.R. Rep. No. 30, 39th Cong., 1st Sess., pt. 2, at 272 (1866).

As Senator Henry Wilson summarized: "There is one unbroken chain of testimony from all people that are loyal to this country, that the greatest outrages are perpetrated by armed men who go up and down the country searching houses, disarming people, committing outrages of every kind and description." *McDonald*, 130 S.Ct. at 3039, citing 39th Cong. Globe 915 (1866). In fact, the disarming of African Americans persisted throughout the entire period of Reconstruction. *See generally* Stephen P. Halbrook, *Freedmen, the Fourteenth Amendment, and the Right to Bear Arms* (1998).

Section 1 of the Civil Rights Act of 1871, 17 Stat. 13, today's 42 U.S.C. § 1983, was intended to remedy such infringements by providing that any person who, under color of State law, subjects a person "to the deprivation of any rights, privileges, or immunities secured by the Constitution" is civilly liable.

"[I]n passing § 1, Congress assigned to the federal courts a paramount role in protecting constitutional rights." *Patsy v. Board of Regents*, 457 U.S. 496, 503 (1982). *Patsy* then quoted Rep. Henry Dawes' explanation of how the federal courts would protect "these rights, privileges, and immunities . . . ." *Id.*, citing Cong. Globe, 42d Cong., 1st Sess., 476 (1871). Dawes had just explained that the citizen "has secured to him the right to keep and bear arms in his defense," and "his house, his papers, and his effects were protected against unreasonable seizure. . . . [I]t is to protect and secure to him in these rights, privileges, and immunities this bill is before the House." Cong.

Globe, *supra*, at 475-76. *See McDonald*, 130 S.Ct. at 3075 (Thomas, J., concurring).

"Opponents of the bill also recognized this purpose . . . ." *Patsy*, 457 U.S. at 504 n.6 (citing remarks of Rep. Washington Whitthorne). On the same page of his speech cited by the Court, Whitthorne objected that "if a police officer of the city of Richmond or New York should find a drunken negro or white man upon the streets with a loaded pistol flourishing it, & c., and by virtue of any ordinance, law, or usage, either of city or State, he takes it away, the officer may be sued, because the right to bear arms is secured by the Constitution . . . ." Cong. Globe at 337. To the contrary, supporters of the bill were concerned that police would arrest a law-abiding African American who was carrying a pistol for self defense – or just keeping it in his or her home – and they wished to provide a legal remedy for such deprivation.

In sum, the Fourteenth Amendment was designed in part to prevent unreasonable searches for and seizures of firearms from law-abiding persons, and § 1983 was designed to remedy such deprivations of rights.

## II. THE NEED TO AVOID GENERAL WARRANTS IS HEIGHTENED REGARDING LAWFUL OR CONSTITUTIONALLY-PROTECTED PROPERTY

### A. The Right Was Clearly Established at the Time of the Search in 2003

When the search took place in 2003, it was clearly established that possession of firearms by residents of a house gave rise to no enhanced probable cause that would loosen the particularity requirement. No "firearm exception" to the Fourth Amendment has ever been accepted: "Our decisions recognize the serious threat that armed criminals pose to public safety . . . But an automatic firearm exception to our established reliability analysis would rove too far." *Florida v. J.L.*, 529 U.S. 266, 272-73 (2000) (holding warrantless search unlawful).

Authorization to seize all firearms, as did the warrant here, flies in the face of the fact that "owning a gun is usually licit and blameless conduct. Roughly 50 percent of American homes contain at least one firearm of some sort . . . ." *Staples v. United States*, 511 U.S. 600, 613-14 (1994). "[T]here is a long tradition of widespread lawful gun ownership by private individuals in this country." *Id.* at 610. "Common sense tells us that millions of Americans possess these items [revolvers, pistols, rifles, and shotguns] with perfect innocence." *United States v. Anderson,* 885 F.2d 1248, 1254 (5th Cir. 1989).

The warrant here authorized a night search, similar to typical no-knock warrants. The precedents

on no-knock warrants reinforce that the warrant violated clearly-established rights. *Gould v. Davis,* 165 F.3d 265, 272 (4th Cir. 1998), rejected a qualified-immunity defense for obtaining a no-knock warrant based on the mere presence of firearms in a house:

> If the officers are correct, then the knock and announcement requirement would never apply in the search of anyone's home who legally owned a firearm. This clearly was not and is not the law, and no reasonable officer could have believed it to be so.

"Evidence that firearms are within a residence, by itself, is not sufficient to create an exigency to officers when executing a warrant." *United States v. Bates*, 84 F.3d 790, 795 (6th Cir. 1996). "The reasonable belief that firearms may have been within the residence, standing alone, is clearly insufficient." *United States v. Marts,* 986 F.2d 1216, 1218 (8th Cir. 1993) (citation omitted).

*Bellotte v. Edwards,* 629 F.3d 415, 419-20 (4th Cir. 2011), rejected qualified immunity regarding a no-knock warrant based on the residents of a house having permits to carry concealed firearms. "It should go without saying that carrying a concealed weapon pursuant to a valid concealed carry permit is a lawful act." *Id.* at 423 (noting further that the officers admitted that "most people in West Virginia have guns").

In sum, many Americans lawfully own firearms, which does not give rise to any presumption that they are unlawful. In obtaining the warrant here to seize all firearms in what they knew to be the residence of Ms. Millender and other non-suspects, and without

taking reasonable steps to verify that the suspect might actually be there, the officers violated clearly-established rights.

### B. Warrants to Search for Constitutionally-Protected Items Must Be Scrutinized With Scrupulous Exactitude

The Second Amendment provides that "the right of the people to keep and bear arms, shall not be infringed." *District of Columbia v. Heller*, 554 U.S. 570, 628 (2008), invalidated a handgun ban with the explanation:

> [T]he inherent right of self-defense has been central to the Second Amendment right. The handgun ban amounts to a prohibition of an entire class of "arms" that is overwhelmingly chosen by American society for that lawful purpose. The prohibition extends, moreover, to the home, where the need for defense of self, family, and property is most acute. Under any of the standards of scrutiny that we have applied to enumerated constitutional rights, banning from the home "the most preferred firearm in the nation to 'keep' and use for protection of one's home and family," . . . would fail constitutional muster.

General warrants are particularly to be condemned regarding constitutionally-protected property, mere possession of which cannot give rise to probable cause to search. "Where presumptively

protected materials are sought to be seized, the warrant requirement should be administered to leave as little as possible to the discretion or whim of the officer in the field." *Zurcher v. Stanford Daily*, 436 U.S. 547, 564 (1978). As applied in that case, this meant: "Where the materials sought to be seized may be protected by the First Amendment, the requirements of the Fourth Amendment must be applied with 'scrupulous exactitude.'" *Id.*, citing *Stanford v. Texas*, 379 U.S. 476, 485 (1965).[26]

In *Stanford*, the warrant specifically described the premises to be searched and authorized the seizure of all writings on the Communist Party, and the affidavit was signed by two state assistant attorneys general. *Id.* at 478-79. Given that "the constitutional requirement that warrants must particularly describe the 'things to be seized' is to be accorded the most scrupulous exactitude when the 'things' are books," the Court held it to be an invalid general warrant. *Id.* at 485. In so doing, the Court noted that the First, Fourth, and Fifth Amendments are "closely related, safeguarding not only privacy and protection against self-incrimination but 'conscience and human dignity and freedom of expression as well.'" *Id.*

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[26] *Stanford* was cited as authority in two of the precedents relevant here. "The uniformly applied rule is that a search conducted pursuant to a warrant that fails to conform to the particularity requirement of the Fourth Amendment is unconstitutional." *Groh v. Ramirez*, 540 U.S. 551, 559 (2004), citing *Stanford* at 476. "The principal evil of the general warrant was addressed by the Fourth Amendment's particularity requirement . . . ." *Ashcroft v. al-Kidd*, 131 S.Ct. 2074, 2084 (2011), citing *Stanford* at 485.

A similar statement could be made about the First, Second, and Fourth Amendments, in that "it has always been widely understood that the Second Amendment, like the First and Fourth Amendments, codified a pre-existing right." *Heller,* 554 U.S. at 592. "Like the First, it [the Second Amendment] is the very product of an interest-balancing by the people . . . ." *Id.* at 635.

Given that the search here took place before this Court's 2008 decision in *Heller*, Petitioners might suggest that the right to keep and bear arms, with attendant restrictions on search warrants, would be clearly established only in post-*Heller* cases.[27] But this would ignore the clear text of the Second Amendment as well as prior decisions of this Court recognizing the rights therein.[28] Even without any constitutional

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[27] *See Bellotte*, 629 F.3d at 428 (Wynn, J., dissenting in part) ("I join the majority in concluding that the no-knock entry here was unlawful. As a result of this case, the law will be clearly established as to any similar entries in the future.").

[28] *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990), explained:

> The Second Amendment protects "the right of the people to keep and bear Arms" . . . . While this textual exegesis is by no means conclusive, it suggests that "the people" protected by the Fourth Amendment, and by the First and Second Amendments, and to whom rights and powers are reserved in the Ninth and Tenth Amendments, refers to a class of persons who are part of a national community . . . .
>
> "The most familiar of the substantive liberties protected by the Fourteenth Amendment are those recognized by the Bill of

recognition, lawful firearms are and have always been widely possessed in American homes, rendering a general warrant to seize all of them from all residents, none of which was a suspect in anything, violative of clearly established rights.

## III. THE GENERAL WARRANT HERE VIOLATED CLEARLY ESTABLISHED RIGHTS

"If the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct." *Harlow v. Fitzgerald,* 457 U.S. 800, 818-819 (1982). Both from the text of the Fourth Amendment and from caselaw going back for centuries, the unlawfulness of general warrants is clearly established, and the warrant here was facially a general warrant.

The fact that the exact details in this case may not be the subject of a prior opinion is not pertinent. *Hope v. Pelzer*, 536 U.S. 730, 739 (2002), explains:

> For a constitutional right to be clearly established, its contours "must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held

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Rights." *Planned Parenthood v. Casey*, 505 U.S. 833, 847-48 (1992) (referring to "the specific guarantees elsewhere provided in the Constitution [such as] . . . the right to keep and bear arms").

> unlawful . . .; but it is to say that in the light of pre-existing law the unlawfulness must be apparent."

*Id.*, quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987).

Moreover, "general statements of the law are not inherently incapable of giving fair and clear warning, and in other instances a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though 'the very action in question has [not] previously been held unlawful' . . . ." *United States v. Lanier*, 520 U.S. 259, 270-71 (1997),[29] quoting *Anderson*, 483 U.S. at 640. This "makes clear that officials can still be on notice that their conduct violates established law even in novel factual circumstances." *Hope*, 536 U.S. at 741.

*Groh v. Ramirez*, 540 U.S. 551 (2004), involved a general warrant to search for unregistered firearms which contained no list of firearms to seize. A list of

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[29] "The easiest cases don't even arise. There has never been . . . a section 1983 case accusing welfare officials of selling foster children into slavery; it does not follow that if such a case arose, the officials would be immune from damages [or criminal] liability." *Id.* at 271 (citation omitted). Citing *Lanier*, qualified immunity was rejected in a case regarding a no-knock warrant based on the mere presence in the house of persons with permits to carry concealed firearms. *Bellotte*, 629 F.3d 415. "The absence of 'a prior case directly on all fours' here speaks not to the unsettledness of the law, but to the brashness of the conduct." *Id.* at 424 (citation omitted). *See also Motley v. Parks*, 432 F.3d 1072, 1089 (9th Cir. 2005) (where officer held an infant at gunpoint, "notwithstanding the absence of direct precedent, the law may be, as it was here, clearly established").

firearms was included in the affidavit, but not attached to the warrant. Only lawful firearms were found. The homeowners later filed a civil rights action for damages. This Court held that the search was unlawful and that the agent who secured the warrant and led the search could not rely on the defense of qualified immunity.

*Groh* began: "The warrant was plainly invalid. The Fourth Amendment states unambiguously that 'no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and *particularly describing* the place to be searched, and *the persons or things to be seized.*'" *Id.* at 557 (emphasis in original). The warrant met the test of being "so facially deficient . . . that the executing officers cannot reasonably presume it to be valid." *Id.* at 565, quoting *Leon,* 468 U.S. at 923.

Noting that "the Magistrate might have believed that some of the weapons mentioned in the affidavit could have been lawfully possessed and therefore should not be seized," *id.* at 560-61, *Groh* rejected the defense that the magistrate had signed the warrant in reliance on the affidavit with a list of the firearms suspected to be illegal: "Nor would it have been reasonable for petitioner to rely on a warrant that was so patently defective, even if the Magistrate was aware of the deficiency." *Id.* at 560 n.4. The following directly applies here:

> Given that the particularity requirement is set forth in the text of the Constitution, no reasonable officer could believe that a warrant that plainly did not comply with that requirement was valid. . . . Moreover, because petitioner himself

> prepared the invalid warrant, he may not argue that he reasonably relied on the Magistrate's assurance that the warrant contained an adequate description of the things to be seized and was therefore valid.

*Id.* at 563-64.

In *Groh*, the affidavit specifically alleged that unregistered firearms were on the premises, but that was not included in the warrant. Here, probable cause existed only to seize one specific firearm, but the warrant authorized the seizure of all firearms on the premises. "Because not a word in any of our cases would suggest to a reasonable officer that this case fits within any exception to that fundamental tenet, petitioner is asking us, in effect, to craft a new exception." *Id.* at 564-65. This Court declined to do so in *Groh*, and it should do so here. Indeed, this case is more egregious than *Groh*, in which the officer simply forgot to make the description of the firearms a part of the warrant. Here, the officer procuring the warrant misled the magistrate, but even then the warrant was facially unconstitutional. He cannot now rely on the defense that he persuaded others up the chain to approve his general warrant.

It makes no difference here that a deputy district attorney approved the warrant and a magistrate signed it. *Millender*, 620 F.3d at 1022. The deputies had an independent duty not to seek or serve a general warrant. Applying for a warrant should not be a game in which officers see how far they can push the envelope and still get approvals from prosecutors and signatures from judges.

Besides failing to disclose who really resided at the house, the affidavit here implied that there was a gang connection to illegal firearms. "It is clearly established that judicial deception may not be employed to obtain a search warrant." *KRL v. Moore*, 384 F.3d 1105, 1117 (9th Cir. 2004). "The use of deliberately falsified information is not the only way by which police officers can mislead a magistrate when making a probable cause determination. By reporting less than the total story, an affiant can manipulate the inferences a magistrate will draw." *United States v. Stanert*, 762 F.2d 775, 781 (9th Cir. 1985).

*United States v. Kow*, 58 F.3d 423, 426-27 (9th Cir.1995), rejected a good faith argument regarding a general warrant authorizing seizure of every document and computer file on the premises. Its facial invalidity was not saved by "[t]he mere fact that the warrant was reviewed by two AUSA's and signed by a magistrate . . . ." *Id.* at 428-29 (citation omitted).

*In re Search Warrant for K-Sports Imports, Inc.*, 163 F.R.D. 594, 595 (C.D. Cal. 1995), involved a warrant authorizing the seizure not just of certain machineguns, documents, and computer records at issue, but *all* such items. "The phrase 'including but not limited to' in the search warrant converts the search warrant into a general warrant, allowing the seizure of any, and all, weapons, documents, and computer records/data . . . ." *Id.* at 596-97. Since "nothing in [the] affidavit supports the seizure of any firearm . . . unrelated to the purported machine guns," the search was unlawful. *Id.* at 597. The parallel with the facts here is evident.

Finally, it was clearly established that "the critical element in a reasonable search is . . . that there

is reasonable cause to believe that the specific 'things' to be searched for and seized are located on the property." *Zurcher*, 436 U.S. at 556. Here, it was pure speculation that the suspect was at the house with his firearm, that there were other firearms on the premises, and that they belonged to the suspect instead of any of the ten actual residents. *See United States v. Cazares*, 121 F.3d 1241, 1245 (9th Cir. 1997) ("it is pure speculation whether [defendant], though a resident of the apartment, ever had possession or dominion of any of the firearms"); *United States v. Reese*, 775 F.2d 1066, 1074 (9th Cir. 1985) ("it is 'pure speculation' as to which of the house's occupants possessed the guns.").[30] "[J]oint occupancy of a residence is not enough to show possession," *United States v. Frushon*, 10 F.3d 663, 665 (9th Cir. 1993) (citation omitted), but in that case "[t]he photograph . . . identifies [defendant] as the person whose gun it was." Here, when they seized Ms. Millender's shotgun, the officers knew it was *not* the one shown in the photograph of the suspect.

In sum, in *Groh* the law was clearly established in the very text of the Fourth Amendment. Caselaw condemning general warrants in England dates back to 1765 in *Entick*, and in the United States to 1886 in *Boyd*. The general warrant here – to search for all firearms and related items, when only a black, short-barreled shotgun with a pistol grip was at issue, and it had no connection to the house to be searched – clearly violated the Fourth Amendment, would be known to do

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[30]"[A]ccess to premises does not equate to possession." *United States v. Ruiz*, 462 F.3d 1082, 1089 (9th Cir. 2006).

so by any competent officer, and was not sanctified by being rubber stamped by higher ups.

## CONCLUSION

This Court should hold that the qualified immunity defense may not be asserted in this case, and affirm the judgment of the court below.

Respectfully submitted,

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# AMICUS CURIAE BRIEF

RECORD
AND
FILED

No. 10-704

# In The
# Supreme Court of the United States

CURT MESSERSCHMIDT AND ROBERT J. LAWRENCE,
*Petitioners,*

v.

AUGUSTA MILLENDER, BRENDA MILLENDER,
AND WILLIAM JOHNSON,
*Respondents.*

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

## BRIEF OF TEXAS, ALABAMA, ALASKA, ARKANSAS, COLORADO, DELAWARE, FLORIDA, GEORGIA, HAWAII, IDAHO, INDIANA, KANSAS, LOUISIANA, MAINE, MICHIGAN, MISSISSIPPI, MONTANA, NEBRASKA, NORTH DAKOTA, NEW MEXICO, PENNSYLVANIA, RHODE ISLAND, SOUTH DAKOTA, UTAH, WISCONSIN, AND WYOMING AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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## INTEREST OF AMICI CURIAE

Many federal judges continue to adopt broad and atextual interpretations of the Fourth Amendment that hinder state law-enforcement efforts and allow guilty criminals to escape punishment. Amici curiae have an interest in ensuring that federal courts respect and enforce this Court's qualified-immunity doctrines as well as the good-faith exception to the exclusionary rule, both of which mitigate some of the unattractive features of modern Fourth Amendment jurisprudence.

## CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. CONST. amend. IV states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

42 U.S.C. § 1983 states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

## STATEMENT

Petitioners Curt Messerschmidt and Robert Lawrence executed a search warrant at the respondents' home. The respondents then sued Messerschmidt and Lawrence under 42 U.S.C. § 1983, accusing them of obtaining a defective search warrant and carrying out a search that violated the respondents' Fourth Amendment rights. The Ninth Circuit, sitting en banc, concluded that the search warrant was unsupported by probable cause, and denied the officers qualified immunity. Three judges dissented, arguing that Messerschmidt and Lawrence were entitled to qualified immunity under *Malley v. Briggs*, 475 U.S. 335 (1986), and *United States v. Leon*, 468 U.S. 897 (1984).

## SUMMARY OF ARGUMENT

Although this Court's precedents require federal courts to defer to law-enforcement officers who rely on warrants issued by magistrates, the Ninth Circuit effectively conducted a de novo review of the probable-cause issues in this case. After finding the search warrant defective and unsupported by probable cause, the Ninth Circuit simply declared the officers' contrary beliefs unreasonable and undeserving of qualified immunity. *Millender v. County of Los Angeles*, 620 F.3d 1016, 1028-29 (9th Cir. 2010). Although the Ninth Circuit gestures toward the deferential standards established in this Court's case law, it only quotes them and does not apply them. This approach to qualified immunity

resembles the Ninth Circuit's past treatment of the deferential provisions in the federal habeas corpus statute. *See, e.g.*, 28 U.S.C. § 2254(d). It should meet the same resounding demise. *See Harrington v. Richter*, 131 S. Ct. 770, 785 (2011).

The Court should use this case not simply to correct the Ninth Circuit's error, but also to prevent other appellate courts from using the Ninth Circuit's maneuver to gut the qualified-immunity defense and the good-faith exception to the exclusionary rule. First, we urge the Court to reiterate that the defense of qualified immunity is co-extensive with the good-faith exception to the exclusionary rule. *See Groh v. Ramirez*, 540 U.S. 551, 565 n.8 (2004); *Malley v. Briggs*, 475 U.S. 335, 344 (1986). To the extent that this Court's recent pronouncements in *Herring v. United States*, 555 U.S. 135 (2009), and *Davis v. United States*, 131 S. Ct. 2419 (2011), curtail the scope of the exclusionary rule, they equally limit the ability of courts to mulct state officers who rely on defective search warrants. The Ninth Circuit erred by failing to apply *Herring* to this case, and although *Davis* post-dates the Ninth Circuit's ruling, this Court should make clear that both *Herring* and *Davis* apply when future courts consider qualified-immunity defenses.

Second, this Court should remind the lower courts that violations of the Fourth Amendment's Warrant Clause do not automatically violate the amendment's separate and distinct prohibition on "unreasonable" searches and seizures. The Ninth

Circuit proceeded as if every search conducted under a defective search warrant is "warrantless," and hence "unreasonable." *Millender*, 620 F.3d at 1032-33. This not only ignores the multitude of warrantless searches that this Court has approved as "reasonable," it also ignores the fact that *Groh* deemed a search with a defective warrant "unreasonable" because the search warrant "did not describe the items to be seized *at all*" and was "obviously deficient" for that reason. 540 U.S at 558. The warrant in this case, by contrast, *did* describe items to be seized; the Ninth Circuit simply disagreed with the magistrate's conclusions regarding probable cause. *Groh* does not establish that every search under an invalid warrant is *per se* "warrantless" or "unreasonable." At the very least, reasonable officers can conclude that *Groh*'s holding extends only to defective search warrants that fail to list *any* items to be seized, and that is all that Messerschmidt and Lawrence need to show to establish a qualified-immunity defense.

## ARGUMENT

There are two questions presented in this case. The first is whether Messerschmidt and Lawrence can claim qualified immunity under the standards of *Malley v. Briggs*, 475 U.S. 335 (1986), and *United States v. Leon*, 468 U.S. 897 (1984). The petitioners' brief capably demonstrates that Messerschmidt and Lawrence are entitled to qualified immunity on that basis.

The second question presented is: "Should the *Malley/Leon* standards be reconsidered or clarified in light of lower courts' inability to apply them in accordance with their purpose of deterring police misconduct, resulting in imposition of liability on officers for good-faith conduct and improper exclusion of evidence in criminal cases?" Pet. Br. i. The answer to this question is "yes." The petitioners' brief focuses primarily on the error-correction issue. Rather than revisit that discussion, amici States write to explain how the Court might "clarify" the *Malley/Leon* regime to prevent other courts from emulating the Ninth Circuit's conduct in this litigation. We offer two ways for this Court to clarify the requirements of qualified immunity and the scope of the exclusionary rule when officers conduct searches under defective warrants.

## I. An Officer's Qualified-Immunity Defense Is Coextensive With the Good-Faith Exception to the Exclusionary Rule.

This Court has repeatedly equated the scope of an officer's qualified-immunity defense with the good-faith exception to the exclusionary rule. *See Groh*, 540 U.S. at 565 n.8 ("[T]he same standard of objective reasonableness that we applied in the context of a suppression hearing in *Leon* defines the qualified immunity accorded an officer.") (quoting *Malley*, 475 U.S. at 335). This longstanding principle has two important implications for the lower courts. First, all of this Court's pronouncements on the good-faith exception to the exclusionary rule necessarily

inform the scope of qualified immunity when litigants sue officers over defective search warrants. When *Herring* and *Davis* limit the exclusionary remedy to "deliberate, reckless, or grossly negligent" violations of Fourth Amendment rights, it logically follows that officers who violate the Fourth Amendment are entitled to qualified immunity absent a showing of "deliberate, reckless, or grossly negligent" conduct. *See Herring*, 555 U.S. at 144; *Davis*, 131 S. Ct. at 2427-28. Likewise, when *Herring* and *Davis* extend the good-faith exception to Fourth Amendment violations caused by simple, "isolated" negligence, it follows that qualified immunity must also attach to Fourth Amendment violations produced by an isolated negligent act. *See Herring*, 555 U.S. at 147-48; *Davis*, 131 S. Ct. at 2427-28.

Second, the standards from this Court's qualified-immunity jurisprudence must inform the scope of the good-faith exception to the exclusionary rule. Under the qualified-immunity doctrine, for example, officers who violate the Constitution are liable for damages only if they violate "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Lower courts must therefore limit the exclusionary remedy to cases in which the Fourth Amendment contravenes "clearly established" law that a reasonable person should know. The exclusionary remedy stops where qualified immunity

begins, and the good-faith exception starts where liability for damages ends.

The Ninth Circuit's opinion purports to acknowledge this symmetrical relationship between qualified-immunity doctrine and the good-faith exception to the exclusionary rule. *See Millender*, 620 F.3d at 1032 ("[O]fficers would be entitled to qualified immunity in § 1983 actions only under the same facts that would allow the government to claim a good faith exception to the exclusionary rule in a suppression hearing."). Yet it never cites *Herring*, which limits the exclusionary remedy—and the prospect of money damages—to Fourth Amendment violations produced by "deliberate, reckless, or grossly negligent" conduct or "recurring or systemic negligence." 555 U.S. at 144. In denying qualified immunity, the Ninth Circuit instead asserts only that "a reasonably well-trained officer" in the position of Messerschmidt or Lawrence would have known that the search warrant failed to establish probable cause. *Millender*, 620 F.3d at 1031. This is nothing more than an accusation of simple, isolated negligence. After *Herring* and *Davis*, that is insufficient to trigger either the exclusionary rule or liability for money damages.

## II. The Ninth Circuit Erred by Automatically Equating a Violation of the Warrant Clause With a Violation of an Individual's Fourth Amendment Rights.

The Fourth Amendment embodies two distinct constitutional rules. The first of these rules secures an individual right to be free from unreasonable searches and seizures: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ." The second rule limits the circumstances in which a warrant may issue: "[N]o Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Only the first of these rules creates an individual right enforceable under 42 U.S.C. § 1983. The Warrant Clause, by contrast, represents a *restriction* on the issuance of warrants, not a requirement to obtain warrants before searches—and it certainly does not confer individual rights enforceable in section 1983 proceedings. Suppose an officer persuades a magistrate to issue a warrant that they both know to be unsupported by probable cause, but the officer never executes the warrant. The officer will have induced the magistrate to violate the Warrant Clause of the Fourth Amendment by "issuing" the defective warrant, and each of them will have violated any oaths of office that bind them to support and defend the Constitution. But they

have not deprived anyone of their constitutional *rights* until they contravene the Search and Seizure Clause. And only an *unreasonable* search or seizure can violate an individual's Fourth Amendment rights and trigger liability under section 1983.

Throughout its opinion, the Ninth Circuit asserts that officers who conduct searches with defective warrants automatically violate the subject's Fourth Amendment rights. *See Millender*, 620 F.3d at 1024 ("[A] search or seizure pursuant to an invalid warrant constitutes an invasion of the constitutional rights of the subject of that search at the time of [the] unreasonable governmental intrusion.") (internal quotation marks omitted); *id.* at 1031 ("[T]he *search warrant violated* the Millenders' constitutional rights.") (emphasis added). These careless assertions overlook the fact that even warrantless searches and seizures are deemed "reasonable" and "constitutional" in numerous settings, including searches incident to arrest, exigent circumstances, border searches, administrative searches, plain-view searches, and many other situations. *See, e.g.*, *Groh*, 540 U.S. at 572 (Thomas, J., dissenting) (cataloging examples); *see also* Akhil Reed Amar, THE CONSTITUTION AND CRIMINAL PROCEDURE 3-20 (1997) (denying that the Fourth Amendment imposes any "warrant requirement" on searches or seizures, and stressing that the Fourth Amendment is designed to limit warrants and not require them). The Ninth Circuit's assertions also ignore the possibility that an officer

might conduct a reasonable search notwithstanding his defective warrant, so long as he believes that the warrant is valid and conducts the search in a reasonable manner. The petitioner in *Groh*, for example, argued that "even though the warrant was invalid, the search nevertheless was 'reasonable' within the meaning of the Fourth Amendment." 540 U.S. at 558. The Ninth Circuit did not even entertain this possibility. Yet defective search warrants do not violate people's Fourth Amendment rights; only unreasonable searches do. If an unconstitutional warrant does not lead to an *unreasonable* search, then there can be no liability under section 1983.

The Ninth Circuit's efforts to equate violations of the Warrant Clause with violations of individual constitutional rights also caused it to misapply the qualified-immunity inquiry in this case. The test for qualified immunity is *not* whether a reasonable officer in Messerschmidt and Lawrence's position could believe that the search warrant complied with the Fourth Amendment's Warrant Clause. Rather, the test is whether a reasonable officer in their position could believe that the *search* of the respondents' house was reasonable notwithstanding the defective warrant. When *Groh* rejected this type of argument, it emphasized that the warrant in that case was so defective that it "did not describe the items to be seized *at all*" and declared it "obviously deficient" for that reason. 540 U.S. at 558. *Groh* then stated in dicta that less serious shortcomings in

a search warrant could enable officers to carry out "reasonable" searches under the Fourth Amendment. *Id.* The facts of this case are distinguishable from *Groh*; the search warrant *does* describe items to be seized. Reasonable officers in Messerschmidt and Lawrence's position could conclude that *Groh*'s holding applies only to defective search warrants that fail to list *any* items to be seized, and that is enough to establish a qualified-immunity defense in this case.[1]

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[1] Earlier Supreme Court rulings, such as *Massachusetts v. Sheppard*, contain passages suggesting that searches conducted with defective search warrants violate the Constitution. 468 U.S. 981, 988 n.5 (1984) ("The uniformly applied rule is that a search conducted pursuant to a warrant that fails to conform to the particularity requirement of the Fourth Amendment is unconstitutional."). This statement, however, leaves no room for the recognized categories of warrantless searches that satisfy the Fourth Amendment. And in all events, to the extent any tension exists between *Groh* and cases like *Sheppard*, the qualified-immunity doctrine requires courts to resolve this tension in favor of the defendant officers.

## CONCLUSION

The judgment of the Ninth Circuit should be reversed.

Respectfully submitted.

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